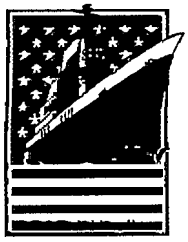


National Cruise Ship Alliance

June 23, 1994

Joseph C. Polking
Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, P.C. 20573

RE: Docket No. 94-06

Dear Mr. Polking:

We are writing in response to the notice published in the Federal Register on March 31, 1994 concerning the proposal to modify your regulations affecting the financial responsibility requirements for cruise operators whose vessels depart from United States ports.

The National Cruise Ship Alliance was formed last year for the purpose of encouraging the development of a U.S. flag cruise ship industry. Its members include all the stakeholders essential to that effort, including business, government and labor representatives. The National Alliance has met with chambers of commerce, port authorities, shipyards, elected officials and maritime interests in Boston; New York; Philadelphia; Baltimore; Washington, P.C.; New Orleans; Galveston; San Diego; San Francisco and Seattle; and has been in close contact with representatives from another half dozen cities, This extensive consultation has led us to the clear conclusion that there has never been a better time to establish a U.S. cruise industry. Toward that end we are strongly supporting legislation pending in Congress which would attract foreign built cruise ships to our U.S. ports and would encourage the construction of new U.S. flag cruise vessels,

We are concerned, however, about the potential impact of the proposed regulations on those efforts. We understand that the suggested elimination of the coverage ceiling. as well as the loss of the self-insurance option, will result in a very significant increase in the cost of compliance for cruise ship companies, In many cases this will require an increase in collateral LO support bonds or guarantees of several hundred percent. For some individual. companies, these changes will require tens of millions of dollars to be set aside for no productive use. These costs can be completely avoided if the operator simply embarks passengers at a port outside of the United States.

Because of the proximity of Caribbean, Canadian and Mexican ports, we are concerned that existing cruise lines, as well as those we are trying to attract to the U.S., wilt choose these foreign ports instead of those in the United States. The economic impact on our communities will be substantial. Moreover, the practical result for American cruise passengers will be a complete loss of even their existing coverage since the operator will no longer be subject to the Commission's jurisdiction at all.

The proposed elimination of the self-insurance option is also troubling because of its disproportionate impact on U.S. flag operators. In order to qual ify for self-insurance, an operator must have U.S. based assets. We understand that no foreign flag company has sufficient assets in the U.S. to qualify for self-insurance under your regulations, but that U.S. flag companies do. Nor only will the proposed elimination of self-insurance hurt these U.S. companies, but also the effort to establish a U.S. flag cruise ship industry.

suite 1200
600 University St.
Seattle, VA 98101-3186
(206) 389-7219
389.7288 FAX

While we are supportive of efforts to protect the American travelling public, we also understand that the current system has worked so well that there has never been a person whose claim for nontransportation was not satisfied. Accordingly, we question how the proposed changes can improve this record and whether they will bc worth the cost to U.S. communities and to efforts such as ours to reclaim some of the cruise industry for the US, flag.

As you review the public comments to this proposal, we urge you to consider thoroughly the impact on efforts to keep and to build a U.S. flag cruise industry as well as the impact on U.S. ports and their surrounding communities. We trust you will not adopt a proposal that will not only reduce protections for Americans, but that will cost American jobs, hun local economies, and disadvantage American companies,

Thank you for your consideration of these comments,

Sincerely,

Robert Gogerty
Chairman

PROPOSED CHANGES TO FMC FINANCIAL RESPONSIBILITY REQUIREMENTS FOR NONPERFORMANCE OF TRANSPORTATION WILL HURT U.S. CRUISE INDUSTRY

Background

The Federal Maritime Commission (FMC) requires cruise ship operators to file evidence of financial responsibility before offering cruises that depart from U.S. ports in order to protect the travelling public against the possibility of lost fares or deposits in the event the transportation is not performed. Public Law 89-777. The regulations permit operators to satisfy the financial responsibility requirements in one of five ways: 1) insurance; 2) self-insurance; 3) escrow account; 4) surety bond, or 5) guaranty. Required coverage is based on 110% of Unearned Passenger Revenue (UPR) up to a maximum ceiling of $15 million.

Since 1990, the FMC has had four separate docketed proceedings and a full fact-finding investigation of the cruise industry and these requirements, The FMC has consistently interpreted the statute to require evidence of financial responsibility (and not a dollar-for-dollar guarantee) allowing operators to self-insure or provide a bond or other evidence of financial responsibility, up to the $15 million ceiling. The system has worked well by keeping out "fly-by-night" operators, and in the 28 years since enactment not a single passenger has ever been unable to recover deposits or fares in the event of nonperformance.

The Proposed Rule

Notwithstanding a complete regulatory record supporting the coverage ceiling (including a specific finding that removal of the ceiling was "unwarranted"), as well as changes to make the self-insurance option more flexible, the FMC has now proposed to make a complete about-face and remove the ceiling and eliminate the self-insurance option. (NPRM dated March 31, 1994 — copy attached). The FMC has extended the due date for comments until Friday, June 24, 1994.

The Impact of the Proposal

The practical effect of the proposed change will be to shift the program away from one of simply requiring evidence that an operator is financially responsible (i.e., not a "fly by-night" operator) to a program requiring a 100% dollar-for-dollar guarantee of coverage, notwithstanding a perfect record and the availability of other protections for passengers. Because insurance is not commercially available and because the other three methods of establishing financial responsibility all require full cash or cash-equivalent collateral, the effect of eliminating both the ceiling and the self-insurance option will mean an enormous increase in cash to be set aside by existing operators. For American Classic Voyages (Delta Queen and American Hawaii) the increase will be over 300% (i.e., an increase from $15 million to more than $46 million). This is the equivalent of Paying cash for a 328-berth vessel that could never be used!

Such a burdensome requirement will frustrate capital improvement plans and be a huge drain on working capital. For intermcdiatc-sized cruise operators, it will mean an increase of two or three times their current requirements and could even be more than a $100 million in some cases. As recently as last year, FMC Chairman Hathaway testified before the House Merchant Marine & Fisheries Committee that neither the FMC nor Congress intended such a result.

The very largest foreign flag cruise operators with the greatest financial strength, sensing an opportunity, are reportedly supporting the new rule, notwithstanding the enormous increase in coverages. They clearly recognize that the rest of the industry, particularly the intermediate-sized operators will be severely disadvantaged, if not crippled, by having to meet this kind of burdensome requirement.

This kind of requirement will discourage operators from departing from U.S. ports since operations from foreign ports escape the requirements altogether. This will also frustrate the statutes principal objective since those cruise passengers will be without any coverage at all,

The proposal to eliminate the self-insurance option will also have a disparate impact on U.S. flag companies since, in order to qualify for self-insurance, a company must have U.S. based assets. The only companies that presently qualify for self-insurance operate U.S. flag vessels.

CC: 020/030

National Cruise Ship Alliance

June 23, 1994

RECEIVED

'94 JUN 27 [illegible]

FEDERAL [illegible]
OFFICE [illegible]

Joseph C. Polking
Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573

RE: Docket No. 94-06

Dear Mr. Polking:

We are writing in response to the notice published in the Federal Register on March 31, 1994 concerning the proposal to modify your regulations affecting the financial responsibility requirements for cruise operators whose vessels depart from United States ports.

The National Cruise Ship Alliance was formed last year for the purpose of encouraging the development of a U.S. flag cruise ship industry. Its members include all the stakeholders essential to that effort, including business, government and labor representatives. The National Alliance has met with chambers of commerce, port authorities, shipyards, elected officials and maritime interests in Boston; New York, Philadelphia; Baltimore; Washington, D.C.; New Orleans; Galveston; San Diego; San Francisco and Seattle; and has been in close contact with representatives from another half dozen cities. This extensive consultation has led us to the clear conclusion that there has never been a better time to establish a U.S. cruise industry. Toward that end we are strongly supporting legislation pending in Congress which would attract foreign built cruise ships to our U.S. ports and would encourage the construction of new U.S. flag cruise vessels.

We are concerned, however, about the potential impact of the proposed regulations on those efforts. We understand that the suggested elimination of the coverage ceiling, as well as the loss of the self-insurance option, will result in a very significant increase in the cost of compliance for cruise ship companies. In many cases this will require an increase in collateral to support bonds or guarantees of several hundred percent. For some individual companies, these changes will require tens of millions of dollars to be set aside for no productive use. These costs can be completely avoided if the operator simply embarks passengers at a port outside of the United States.

Because of the proximity of Caribbean, Canadian and Mexican ports, we are concerned that existing cruise lines, as well as those we are trying to attract to the U.S.; will choose these foreign ports instead of those in the United States. The economic impact on our communities will be substantial. Moreover, the practical result for American cruise passengers will be a complete loss of even their existing coverage since the operator will no longer be subject to the Commission's jurisdiction at all.

The proposed elimination of the self-insurance option is also troubling because of its disproportionate impact on U.S. flag operators. In order to qualify for self-insurance, an operator must have U.S. based assets. We understand that no foreign flag company has sufficient assets in the U.S. to qualify for self-insurance under your regulations, but that U.S. flag companies do. Not only will the proposed elimination of self-insurance hurt these U.S. companies, but also the effort to establish a U.S. flag cruise ship industry.

Suite 1200
600 University St
Seattle, WA 98101-3186
(206) 389-7219
389-7288 FAX

While we are supportive of efforts to protect the American travelling public, we also understand that the current system has worked so well that there has never been a person whose claim for nontransportation was not satisfied. Accordingly, we question how the proposed changes can improve this record and whether they will be worth the cost to U.S. communities and to efforts such as ours to reclaim some of the cruise industry for the U.S. flag.

As you review the public comments to this proposal, we urge you to consider thoroughly the impact on efforts to keep and to build a U.S. flag cruise industry as well as the impact on U.S. ports and their surrounding communities. We trust you will not adopt a proposal that will not only reduce protections for Americans, but that will cost American jobs, hurt local economies, and disadvantage American companies.

Thank you for your consideration of these comments.

Sincerely,

Robert Gogerty
Chairman

PROPOSED CHANGES TO FMC FINANCIAL RESPONSIBILITY REQUIREMENTS FOR NONPERFORMANCE OF TRANSPORTATION WILL HURT U.S. CRUISE INDUSTRY

Background

The Federal Maritime Commission (FMC) requires cruise ship operators to file evidence of financial responsibility before offering cruises that depart from U.S. ports in order to protect the travelling public against the possibility of lost fares or deposits in the event the transportation is not performed. Public Law 89-777. The regulations permit operators to satisfy the financial responsibility requirements in one of five ways: 1) insurance; 2) self-insurance; 3) escrow account; 4) surety bond; or 5) guaranty. Required coverage is based on 110% of Unearned Passenger Revenue (UPR) up to a maximum ceiling of $15 million.

Since 1990, the FMC has had four separate docketed proceedings and a full fact-finding investigation of the cruise industry and these requirements. The FMC has consistently interpreted the statute to require evidence of financial responsibility (and not a dollar-for-dollar guarantee) allowing operators to self-insure or provide a bond or other evidence of financial responsibility, up to the $15 million ceiling. The system has worked well by keeping out "fly-by-night" operators, and in the 28 years since enactment not a single passenger has ever been unable to recover denosits or fares in the event of nonperformance.

The Proposed Rule

Notwithstanding a complete regulatory record supporting the coverage ceiling (including a specific finding that removal of the ceiling was "unwarranted"), as well as changes to make the self-insurance option more flexible, the FMC has now proposed to make a complete about-face and remove the ceiling and eliminate the self-insurance option. (NPRM dated March 3 1, 1994 — copy attached). The FMC has extended the due date for comments until Fridav. June 24. 1994.

The Impact of the Proposal

The practical effect of the proposed change will be to shift the program away from one of simply requiring evidence that an operator is financially responsible (i.e., not a "fly-by-night" operator) to a program requiring a 100% dollar-for-dollar guarantee of coverage, notwithstanding a perfect record and the availability of other protections for passengers. Because insurance is not commercially available and because the other three methods of establishing financial responsibility all require full cash or cash-equivalent collateral, the effect of eliminating both the ceiling and the self-insurance option will mean an enormous increase in cash to be set aside by existing operators. For American Classic Voyages (Delta Queen and American Hawaii) the increase will be over 300% (i.e., an increase from $15 million to more than $46 million). This is the equivalent of paying cash for a 328-berth vessel that could never be used!

CC: 020/030
50
60
022

CARNIVAL
CORPORATION

RECEIVED
'94 JUN 24

ALAN R. TWAITS
General Counsel and Secretary

June 23, 1994

Mr. Joseph C. Polking
Secretary
FEDERAL MARITIME COMMISSION
800 North Capitol St., NW
Washington, DC 20573

RE: DOCKET NO. 94-06
FINANCIAL RESPONSIBILITY REQUIREMENTS
FOR NON-PERFORMANCE OF TRANSPORTATION;
46 CFR PART 540

Dear Mr. Polking:

Carnival --Corporation ("Carnival") submits the following comments to the proposed rule in Docket No. 94-06. Carnival is responding as the parent company of Carnival Cruise Lines, Holland America Lines, and Windstar Cruises. Together these Carnival cruise companies operate eighteen (18) cruise vessels primarily on itineraries which embark passengers from U.S. ports and comprise the largest cruise business in the world. Although Carnival is a member of ICCL which is filing separate comments in this proceeding, the comments herein represent Carnival's position.

Carnival believes that the current gap in cruise industry coverage between passenger deposits (unearned passenger revenues or "UPRs") and levels of financial responsibility for nonperformance of transportation is a legitimate issue for the FMC to again address. As the Commission has identified in this proceeding, the rapid increase in the fleets of the larger cruise companies over the last several years has substantially increased the shortfall in coverage between the current cap of $15 million per operator and the actual amount of UPRs. Carnival believes it is appropriate for the Commission to set rules which provide adequate protection to the cruising public and to adopt standards which are self-adjusting as cruise lines increase in size, so as to avoid the need to return to this issue every few years.

Should even one cruise line fail without adequate passenger protection, the credibility of all lines in the marketplace will suffer from a loss of consumer confidence. Therefore, Carnival feels it is also in the industry's self interest to increase these protections.

1. Self Insurance Should Not Be Eliminated, but Standards Should Be Established To Make It Workable

It is difficult to understand the rationale behind the Commission's proposal to eliminate self-insurance as a vehicle for protecting cruise deposits. Rather, we believe self-insurance standards which establish thresholds of creditworthiness which financially sound cruise companies can work with should be strengthened. By removing the self-insurance option, the Commission would penalize those cruise lines which are the most sound financially. Carnival urges the Commission to permit financially responsible cruise lines to self-insure under practical and workable financial standards which are significantly stronger than those that currently exist.

We would suggest that if a cruise company can meet the following thresholds, it be allowed to self-insure: (A) an "investment grade rating" of its debt by at least two accepted bond rating agencies, or alternatively, (B) meeting certain minimum financial ratios. If the Commission is asking more of the industry, it should be prepared to accept the financial standards which the rating agencies and Wall Street have already applied to and will continue to adjudge a maturing industry. Moreover, in applying the minimum financial ratios the Commission should not needlessly handicap the industry by insisting on the impractical and unnecessary requirement that vessel assets must always be in U.S. waters to qualify under the net worth test.

A. Investment Grade Ratinss by Bond Rating Agencies

Specifically a cruise line should be able to self-insure if it has been given an investment grade rating, for example, BBB- and above from Standard & Poors, and Baa3 and above from Moodys. Other government agencies charged with making commercial decisions as to the creditworthiness of private sector companies already look to these ratings as the appropriate financial standard. The Overseas Private Investment Corporation (OPIC), for example, uses Standard & Poors and Moodys ratings when determining the insurability of a company in the context of a potential foreign investment. The Commission should likewise step up to this comprehensive and tried yet simple way of determining financial responsibility and creditworthiness.

B. Meeting Certain Minimum Financial Ratios

Should a cruise line not be rated by the bond rating agencies or not have received an investment grade rating because it is not large enough or a publicly traded company, both of the following

minimum financial ratios should be met by the cruise line to determine whether its financial condition is sufficiently strong to protect UPRs and thereby permit self-insurance. Financial reports attesting to these ratios should be certified to quarterly by the cruise line's Chief Financial Officer and certified to at year's end by the company's independent auditors.

(1) Liquidity Test

A minimum liquidity test should be established whereby a cruise company's cash, short-term investments and undrawn credit lines must equal or exceed 100% of its UPRs. The liquidity test is an appropriate gauge of a company's ability to satisfy passenger claims on a timely basis, without having to liquidate its cruise ship assets.

(2) Three Times Tansible Net Worth Test

In addition to a liquidity test a cruise company should also be required to meet a minimum tangible net worth test. Under the tangible net worth test, instead of the Commission's current requirements of net worth equal to at least **110%** of passenger deposits, the standard should be strengthened because non-current or cruise ship assets may indeed not always be worth their carrying values in the event of a need to liquidate such assets. Therefore, we recommend that a cruise company's tangible net worth (excluding intangible assets such as good will) should be equal to or exceed three times its UPRs (the "three times tangible net worth test") Net worth is the excess of a company's assets over its liabilities, including its liabilitv for unearned passenger revenue. Thus the three times tangible net worth test provides the passenger with assets available to cover UPRs of at least four to one. This is significant and substantial passenger protection.

The three times tangible worth test is a standard of creditworthiness which transcends the location of a company's assets. For companies in the cruise business, vessels typically comprise the most significant portion of their assets. In order for the net worth test to ever be available to the international cruise industry which embarks passengers out of U.S. ports, the Commission must remove its current narrow requirement that assets be located within the U.S. at all times. There is no statutory mandate for this restrictive view of assets. Interestingly the statute itself plainly applies to passengers embarking from U.S. ports. (46 App. U.S.C., 817e). It does not apply only to those very few cruise vessels remaining at all times in the U.S.

Embarkation from U.S. ports defines the jurisdiction of the statute. If the Commission determines to limit a company's assets

under the net worth test by location at all, and Carnival believes the Commission is not compelled to and should not do so, the limit should be consistent with the statute. At the very least, vessels embarking passengers in the U.S. or U.S. territorial ports, or which otherwise make calls in U.S. or U.S. territorial ports, should be counted as assets, regardless of whether they venture out of U.S. waters. The Commission. of course could require the appointment of an agent in the U.S. for service of process as a condition for self insurance if it was concerned about amenability to lawsuit in the U.S.

A cruise company meeting the self-insurance tests proposed herein clearly has the resources to satisfy passenger claims for UPRs. It is inconsistent with the statute for the Commission to find that cruise vessels embarking passengers from U.S. ports and therefore subject to the Act, are not U.S. based and cannot qualify for self-insurance under the net worth test because they are not continually in U.S. waters. This writes non-Jones Act vessels out of the regulations (and out of the Act). Such an interpretation would be unintended by Congress.

C. Other Considerations In Applying Self-Insurance Tests

The Commission should also be flexible and realistic in applying the self-insurance tests to affiliated companies on a consolidated basis. That is, where more than one cruise line is under common ownership control, albeit operating under different cruise line identities and companies, the investment grade rating test, the three times tangible net worth test, and the liquidity test should be applied to the commonly held cruise lines on a consolidated basis, so that the parent (or the parent and all cruise line subsidiaries and affiliates) are considered the self-insurers, under a consolidated filing.

The Commission's current qualification requirements for self-insurers relating to the minimum of five years in the U.S. trades could be retained, although if the cruise company meets the stringent financial tests proposed by Carnival, it is difficult to see the relevance in retaining the five year rule. As for reporting requirements, the quarterly and annual financial filings and certifications must be retained for the net worth and liquidity tests to demonstrate that the minimum financial ratios have been met. Certifications of investment grade ratings by the bond rating agencies are reliable and should alleviate the need for such financial reporting requirements if investment grade ratings have been obtained.

11. Bonding If Self-Insurance Requirements Are Not Met

If a cruise company is unable to self-insure by meeting either the investment grade ratings test or the minimum financial ratios test, then Carnival supports a much higher level of bonding than currently exists to protect passengers. In light of the total amount of passenger deposits, the Commission's first alternative of bonding 110% of UPRs up to $25 Million per operator, and 90% of UPRs for amounts exceeding $25 Million appears reasonable.

III. Summary

The self-insurance proposal recommended by Carnival clearly would allay the Commission's concern that passengers would have insufficient assets to attach. Existing superior claims, such as mortgages and shipyard debt, would plainly not eat up unsecured passenger claims under the three times tangible net worth test, given the surfeit of net worth. The quarterly reporting requirements ensure adequate lead time in the event an enterprise falls below the self-insurance tests. The proposed bonding sliding scale also is self adjusting and alleviates the need to review this issue year after year. Carnival's strong desire is to be able to self-insure under the realistic but strict financial tests proposed herein. Lines not qualifying for self-insurance should close the gap in protection to the public with the kind of sliding scale bonding proposed by the Commission.

Carnival appreciates the opportunity to respond to this proposed rulemaking proceeding.

Respectfully submitted,

CARNIVAL CORPORATION

By: _____
Alan R. Twaits
General Counsel and
Secretary

CC 020/030
50
60
022

U.S. House of Representatives
Committee on
Merchant Marine and Fisheries
Room 1334, Longworth House Office Building
Washington, DC 20515-6230

RECEIVED
'94 JUN 24
OFFICE OF THE

June 24, 1994

Mr. Joseph C. Polking
Secretary
Federal Maritime Commission
800 North Capitol Street, NW
Washington, DC 20573

Re: Docket No. 94-06

Dear Mr. Secretary:

We share your concern that members of the travelling public be adequately protected against the loss of their advance deposits or fares in the event the cruises for which they have purchased tickets are not performed, Nearly 30 years ago Congress enacted Public Law 89-777 to address a problem faced by U.S. travellers who were literally left stranded at the dock when the foreign ships on which they had booked cruises failed to show up. The statute has worked very well in eliminating these fly-by-night operators. In the years since then not a single passenger has been unable to recover fares where a cruise was not performed.

Like Congress, you have been mindful of the significant growth in the North American cruise industry in recent years. We know that you have conducted an extensive factfinding investigation and a series of hearings and rulemakings regarding the implementation of this statute. As part of that process you asked this Committee to amend the original statute to provide you with greater flexibility in determining financial responsibility of cruise operators so as to meet the changing needs of the industry. Just last December, Congress made those changes with the enactment of Public Law 103-206.

Having both witnessed and participated in that process, we were surprised to learn of your current rulemaking. It appears to mark a sharp departure from the substance and trend of these earlier initiatives by eliminating both the coverage ceiling and the self-insurance option. We are especially concerned with the proposed elimination of the self-insurance option because of the reliance on it by U.S.-flag operators, whose assets are here in the United States.

We understand that the proposed rule will dramatically increase the collateral requirements for most operators in the business today placing a substantial, and unanticipated, burden on these companies. In light of the record established to date, we urge you to undertake a

thorough investigation of the impacts of such a proposal on the industry, particularly to determine whether the new requirements *will* simply encourage the very same operators to shift their port of departure from the U.S. to a nearby Caribbean,, Mexican or Canadian port for the purpose of avoiding the Commission's jurisdiction. Such a result would of course completely frustrate the purposes of the statute since, far from enjoying additional coverage, those same U.S. passengers would then be without any coverage at all.

Moreover, at a time when members of this Committee have worked hard to draft legislation and explore other incentives to attract cruise operators to our ports, this consequence would be particularly disappointing, especially for those communities that would benefit from the new jobs and related economic growth. For those ports that will lose current business, the results will be even harder to take.

As you know, our Committee is also dedicated to increasing opportunities fur U.S.-flag *cruise* ship operations. We are *concerned* that because the proposed elimination of the self-insurance option affects only U.S.-flag operators, i.e., the companies with U.S. assets, that it might frustrate those objectives as well.

As you consider this rulemaking, we, therefare, urge you to undertake a complete cost-benefit analysis of the full impact of these proposals in an effort to balance the protection of the consumers' dollars against the impact on the cruise industry and the related jobs and businesses here in the United States. We also urge you to make as thorough and reasoned a study of the issues now as you did when you adopted the current regulations that these new proposals would overturn.

We appreciate your consideration of these comments.

Sincerely,

Gerry E. Studds
Chairman

Jack Fields
Ranking Republican Member

William O. Lipinski
Chairman
Subcommittee on Merchant Marine and Fisheries

Herbert H. Bateman
Ranking Republican Member
Subcommittee on Merchant Marine and Fisheries

Committee an Merchant Marine and Fisheries
1334 Longworth House Office Building
Washington, D.C. 20515
(202) 225-4047

FAX TRANSMISSION COVER SHEET

DATE: 6/24/94

This transmission includes page/s. Please contact _____ at (202) 225-4047 if problems arise with this transmission.

TO: Bob Bousquin

FAX #: 523-0014

FROM: Carl Bentzel

FAX #: _____

RE: _____

MESSAGE:

CC:020/030

U.S. House of Representatives
Committee on
Merchant Marine and Fisheries
Room 1334, Longworth House Office Building
Washington, DC 20515-6230

RECEIVED
'94 JUN 27 P2:45
FEDERAL MARITIME COMMISSION

June 24, 1994

Mr. Joseph C. Polking
Secretary
Federal Maritime Commission
800 North Capitol Street, NW
Washington, DC 20573

Re: Docket No. 94-06

Dear Mr. Secretary:

We share your concern that members of the travelling public be adequately protected against the loss of their advance deposits or fares in the event the cruises for which they have purchased tickets are not performed. Nearly 30 years ago Congress enacted Public Law 89-777 to address a problem faced by U.S. travellers who were literally left stranded at the dock when the foreign ships on which they had booked cruises failed to show up. The statute has worked very well in eliminating these fly-by-night operators. In the years since then not a single passenger has been unable to recover fares where a cruise was not performed.

Like Congress, you have been mindful of the significant growth in the North American cruise industry in recent years. We know that you have conducted an extensive factfinding investigation and a series of hearings and rulemakings regarding the implementation of this statute. As part of that process you asked this Committee to amend the original statute to provide you with greater flexibility in determining financial responsibility of cruise operators so as to meet the changing needs of the industry. Just last December, Congress made those changes with the enactment of Public Law 103-206.

Having both witnessed and participated in that process, we were surprised to learn of your current rulemaking. It appears to mark a sharp departure from the substance and trend of these earlier initiatives by eliminating both the coverage ceiling and the self-insurance option. We are especially concerned with the proposed elimination of the self-insurance option because of the reliance on it by U.S.-flag operators, whose assets are here in the United States.

We understand that the proposed rule will dramatically increase the collateral requirements for most operators in the business today placing a substantial, and unanticipated, burden on these companies. In light of the record established to date, we urge you to undertake a

thorough investigation of the impacts of such a proposal on the industry, particularly to determine whether the new requirements will simply encourage the very same operators to shift their port of departure from the U.S. to a nearby Caribbean, Mexican or Canadian port for the purpose of avoiding the Commission's jurisdiction. Such a result would of course completely frustrate the purposes of the statute since, far from enjoying additional coverage, those same U.S. passengers would then be without any coverage at all.

Moreover, at a time when members of this Committee have worked hard to draft legislation and explore other incentives to attract cruise operators to our ports, this consequence would be particularly disappointing, especially for those communities that would benefit from the new jobs and related economic growth. For those ports that will lose current business, the results will be even harder to take.

As you know, our Committee is also dedicated to increasing opportunities for U.S.-flag cruise ship operations. We are concerned that because the proposed elimination of the self-insurance option affects only U.S.-flag operators, i.e., the companies with U.S. assets, that it might frustrate those objectives as well.

As you consider this rulemaking, we, therefore, urge you to undertake a complete cost-benefit analysis of the full impact of these proposals in an effort to balance the protection of the consumers' dollars against the impact on the cruise industry and the related jobs and businesses here in the United States. We also urge you to make as thorough and reasoned a study of the issues now as you did when you adopted the current regulations that these new proposals would overturn.

We appreciate your consideration of these comments.

Sincerely,

Gerry E. Studds
Chairman

Jack Fields
Ranking Republican Member

William O. Lipinski
Chairman --
Subcommittee on Merchant Marine and Fisheries

Herbert H. Bateman
Ranking Republican Member
Subcommittee on Merchant Marine and Fisheries

KLOSTER CRUISE LIMITED

June 24, 1994

Adam M. Aron
PRESIDENT & CHIEF EXECUTIVE OFFICER

2 Alhambra Plaza
Coral Gables, Florida 33134
Telephone: (305)460-4900
Telefax: (305) 445-3415

Mr. Joseph C. Polking
Secretary
Federal Maritime Commission
800 North Capitol Street, NW
Washington, DC 20573

Re: Docket No. 94-06
Financial Responsibility Requirements for
Nonperformance of Transportation; Proposed Rule

Dear Mr. Polking:

Kloster Cruise Limited is a Coral Gables, Florida based operator of cruise ships. Operating through its Norwegian Cruise Line and Royal Viking Line divisions ("NCL/RVL"), and as the parent company of Royal Cruise Line Limited ("RCL"), Kloster Cruise Limited ("Kloster") is the third largest cruise ship operator in the world.

Kloster is a member of the International Council of Cruise Lines ("ICCL"), a non-profit trade association. On behalf of its members, the ICCL filed its own comments ("Response") to the Commission's proposed regulations to increase the bonding requirements for a cruise operator's unearned passenger revenues ("UPR"). However, the Response represents the industry's comments to the proposed regulations and thus necessarily constitutes a compromise among its members. As a member of the ICCL, Kloster strongly supports the ICCL's comments outlined in the Response. We believe that the ICCL Response indicates the industry's desire and Kloster's desire to be fully accommodating and cooperative with the concerns of the Commission, Furthermore, we wish to assure the Commission that Kloster is fully willing and fully able to meet the conditions that would be imposed upon the industry if it adopts the changes set forth in the ICCL's Response.

However, as supportive as Kloster is to the ICCL Response, and as eager as Kloster is to assure the traveling public that they can continue to rely upon the financial integrity of the cruise industry, Kloster's support for changes in regulations is contingent on the Commission's acceptance of the ICCL's requested changes to the existing regulations as more particularly described in the Response.

First of all, it is important to note that Kloster does not believe that a need exists to further limit a passenger's exposure to a cruise operator's UPR. Public Law 89-777 was not designed to provide virtual guarantees of a cruise operator's financial responsibility, but rather was designed to establish "reasonable" levels of financial responsibility In fact, since its enactment, Public Law 89-777 has soundly provided passengers with more than adequate financial protection, Moreover, the cruise industry's performance has been exemplary and missed sailings are a rare occurrence.

Furthermore, circumstances have not changed since the last time the Commission addressed the UPR bonding requirements thereby warranting changes to the existing regulations. For instance, the American Hawaii bankruptcy referred to by the Commission in Docket No. 94-06 did not subject any passenger to any greater risk of loss, as this proceeding was actually a pre-arranged transaction designed to facilitate the sale of the company. Likewise, without any corresponding decrease in the bonding amount, the estimated 700 million dollars of UPR now presently covered by the bonds is, in actuality, a decrease in the amount of UPR since the time the Commission last reviewed the bonding requirements.

Despite there being no persuasive need for any changes in the existing bonding requirements, Kloster understands that public perception is important. Therefore, Kloster, along with many other members of the ICCL, is in strong support of the Commission's desire to increase the bonding requirements.

However, Kloster's support for the increased bonding is predicated on the Commission acknowledging the financial burdens that will be placed on cruise operators as a result of such increased bonding requirements. Kloster willingly accepts the Commission's alternative proposal, when coupled with ICCL's suggested changes to such a proposal. Specifically, those ICCL changes which are of greatest importance to Kloster include:

(1) A phase-in schedule of these substantial increased bonding requirements in no greater amounts and at no more rapid a pace than that proposed in the ICCL Response. This phase-in would allow responsible cruise operators, such as Kloster, who make their operating and financial plans, including capital expenditures, many years in advance to divert such funds in order to meet the increased bonding requirements;

(2) The suggested changes that any bonding requirements take into consideration each cruise operator's existing UPR rather than the cruise operator's highest UPR attained during the preceding two year period, thereby permitting a closer correlation to existing UPRs and the proposed increased bonding requirements;

(3) Finally, the Commission should apply the bonding requirements to the organization as a whole, such that, for example, NCL/RVL and RCL's UPRs be aggregated, thereby requiring Kloster to obtain one performance bond based on the combined UPRs of its entire organization.

Without these conditions as outlined in the Response being agreed CO by the Commission, Kloster will not and could not support the Commission's attempt to increase the bonding requirements at this time.

The request that the Commission accept these conditions is even more pronounced by the fact that the service organization for more than 650 surety companies, which represent 95% of the surety bonds written in the United States, has questioned the viability of obtaining the bonding of UPR in excess of the present bonding requirements. (See April 14, 1994 letter from the Surety Association of America.) Therefore, time is required for a cruise operator to adjust to such drastic increases in its bonding requirements. and mechanisms need to be implemented in order to require bonding only for an operator's actual UPRs. Surely the Commission is aware that it has been common at other regulatory agencies (including both the Federal Aviation Administration and the Environmental Protection Agency, as but two examples of many) when proposing sweeping changes to regulations to provide the affected industry with a reasonable multi-year phase-in period to adequately adjust to such changes.

The cruise industry has operated effectively since the passage of Public Law 89-777 and has provided and continues to provide value to the traveling public. However, regulatory changes requiring sudden and dramatic adjustments in cruise operators' capital structure, without well considered phase-in periods (and other appropriate measures to assure fair and equitable treatment of all operators) would likely be harmful to both our industry and consumers.

The above comments notwithstanding, 'because Kloster is deeply interested in protecting the consumer and because Kloster can only benefit from increased consumer confidence in the cruise industry, we would like to reiterate our strong support for the increased bonding requirements as detailed in the ICCL Response, as well as our financial ability to meet such obligations should the ICCL Response be accepted by the Commission

Very truly yours,

KLOSTER CRUISE LIMITED

Adam M. Aron
Chief Executive Officer and President

CC:020/030

KLOSTER CRUISE LIMITED

RECEIVED
'94 JUN 27
FEDERAL
OFFICE OF THE

June 24, 1994

Adam M. Aron
PRESIDENT & CHIEF EXECUTIVE OFFICER

2 Alhambra Plaza
Coral Gables, Florida 33134
Telephone. (305) 460-4900
Telefax. (305) 444-3415

Mr. Joseph C. Polking
Secretary
Federal Maritime Commission
800 North Capitol Street, NW
Washington, DC 20573

Re: Docket No. 94-06
Financial Responsibility Requirements for
Nonperformance of Transportation; Proposed Rule

Dear Mr. Polking:

Kloster Cruise Limited is a Coral Gables, Florida based operator of cruise ships. Operating through its Norwegian Cruise Line and Royal Viking Line divisions ("NCL/RVL"), and as the parent company of Royal Cruise Line Limited ("RCL"), Kloster Cruise Limited ("Kloster") is the third largest cruise ship operator in the world.

Kloster is a member of the International Council of Cruise Lines ("ICCL"), a non-profit trade association. On behalf of its members, the ICCL filed its own comments ("Response") to the Commission's proposed regulations to increase the bonding requirements for a cruise operator's unearned passenger revenues ("UPR"). However, the Response represents the industry's comments to the proposed regulations and thus necessarily constitutes a compromise among its members. As a member of the ICCL, Kloster strongly supports the ICCL's comments outlined in the Response. We believe that the ICCL Response indicates the industry's desire and Kloster's desire to be fully accommodating and cooperative with the concerns of the Commission. Furthermore, we wish to assure the Commission that Kloster is fully willing and fully able to meet the conditions that would be imposed upon the industry if it adopts the changes set forth in the ICCL' s Response.

However, as supportive as Kloster is to the ICCL Response, and as eager as Kloster is to assure the traveling public that they can continue to rely upon the financial integrity of the cruise industry, Kloster's support for changes in regulations is contingent on the Commission's acceptance of the ICCL's requested changes to the existing regulations as more particularly described in the Response.

First of all, it is important to note that Kloster does not believe that a need exists to further limit a passenger's exposure to a cruise operator's UPR. Public Law 89-777 was not designed to provide virtual guarantees of a cruise operator's financial responsibility, but rather was designed to establish "reasonable" levels of financial responsibility. In fact, since its enactment, Public Law 89-777 has soundly provided passengers with more than adequate financial protection. Moreover, the cruise industry's performance has been exemplary and missed sailings are a rare occurrence.

Furthermore, circumstances have not changed since the last time the Commission addressed the UPR bonding requirements thereby warranting changes to the existing regulations. For instance, the American Hawaii bankruptcy referred to by the Commission in Docket No. 94-06 did not subject any passenger to any greater risk of loss, as this proceeding was actually a pre-arranged transaction designed to facilitate the sale of the company. Likewise, without any corresponding decrease in the bonding amount, the estimated 700 million dollars of UPR now presently covered by the bonds is, in actuality, a decrease in the amount of UPR since the time the Commission last reviewed the bonding requirements.

Despite there being no persuasive need for any changes in the existing bonding requirements, Kloster understands that public perception is important. Therefore, Kloster, along with many other members of the ICCL, is in strong support of the Commission's desire to increase the bonding requirements.

However, Kloster's support for the increased bonding is predicated on the Commission acknowledging the financial burdens that will be placed on cruise operators as a result of such increased bonding requirements. Kloster willingly accepts the Commission's alternative proposal, when coupled with ICCL's suggested changes to such a proposal. Specifically, those ICCL changes which are of greatest importance to Kloster include:

(1) A phase-in schedule of these substantial increased bonding requirements in no greater amounts and at no more rapid a pace than that proposed in the ICCL Response. This phase-in would allow responsible cruise operators, such as Kloster, who make their operating and financial plans, including capital expenditures, many years in advance to divert such funds in order to meet the increased bonding requirements;

(2) The suggested changes that any bonding requirements take into consideration each cruise operator's existing UPR rather than the cruise operator's highest UPR attained during the preceding two year period, thereby permitting a closer correlation to existing UPRs and the proposed increased bonding requirements;

(3) Finally, the Commission should apply the bonding requirements to the organization as a whole, such that, for example, NCL/RVL and RCL's UPRs be aggregated, thereby requiring Kloster to obtain one performance bond based on the combined UPRs of its entire organization.

Without these conditions as outlined in the Response being agreed to by the Commission, Kloster will not and could not support the Commission's attempt to increase the bonding requirements at this time.

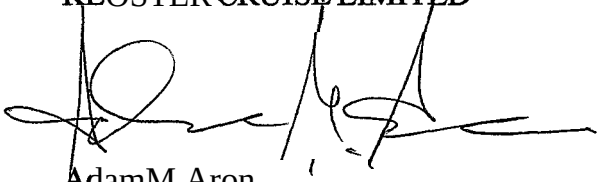
The request that the Commission accept these conditions is even more pronounced by the fact that the service organization for more than 650 surety companies, which represent 95% of the surety bonds written in the United States, has questioned the viability of obtaining the bonding of UPR in excess of the present bonding requirements. (See April 14, 1994 letter from the Surety Association of America.) Therefore, time is required for a cruise operator to adjust to such drastic increases in its bonding requirements, and mechanisms need to be implemented in order to require bonding only for an operator's actual UPRs. Surely the Commission is aware that it has been common at other regulatory agencies (including both the Federal Aviation Administration and the Environmental Protection Agency, as but two examples of many) when proposing sweeping changes to regulations to provide the affected industry with a reasonable multi-year phase-in period to adequately adjust to such changes.

The cruise industry has operated effectively since the passage of Public Law 89-777 and has provided and continues to provide value to the traveling public. However, regulatory changes requiring sudden and dramatic adjustments in cruise operators' capital structure, without well considered phase-in periods (and other appropriate measures to assure fair and equitable treatment of all operators) would likely be harmful to both our industry and consumers.

The above comments notwithstanding, because Kloster is deeply interested in protecting the consumer and because Kloster can only benefit from increased consumer confidence in the cruise industry, we would like to reiterate our strong support for the increased bonding requirements as detailed in the ICCL Response, as well as our financial ability to meet such obligations should the ICCL Response be accepted by the Commission.

Very truly yours,

KLOSTER CRUISE LIMITED



AdamM.Aron
Chief Executive Officer and President

TRANSPORTATION INSTITUTE

5201 Auth Way
Camp Springs, Maryland 20746
(301) 423-3335 (MD)
(202) 347-2590 (Wash., D.C.)
Telecopier (301) 423-0634

Pacifitc Coast Office
2505 2nd Avenue
Suite 720
Seattle, WA 98121
(206) 443-I 738
Telecopier (206) 443-0917

June 24, 1994

Mr. Joseph C. Polking
Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573

RE: DOCKET No. 94-06

Dear Mr. Polking:

The Transportation Institute represents 140 U.S.-flag shipping companies engaged in foreign and domestic trades. Among our member companies is American Classic Voyages, operator of the nation's premier cruise lines, Delta Queen Steamboat Company and American Hawaii Cruises. The Institute appreciates the concern of the Federal Maritime Cormnission that passengers are fairly indemnified against failure to provide agreed upon service. It appears, however, that the approach outlined in Docket No. 94-06 may have the opposite impact and reduce existing consumer protection. The proposal unfairly disadvantages existing U.S.-flag operators while discouraging the development of a healthier U.S.-flag cruise industry. It can also work to reduce the scope of cruise options, both U.S. and foreign-flag, currently available to the U.S. consumer.

Among the Institute's concerns are the following:

.. Cruise vessels embarking U.S. passengers in foreign ports are not required to post performance bonds. Thus, to the extent that this massive increase in bond coverage forces vessels to homeport outside the United States consumer protection for U.S. passengers would be removed. Considering the maximum $5 million bonding per ship, the current fleet of 135 ships would thus have a potential $675 million incentive to homeport outside the United States. This incentive can be expected to increase to $775- $875 million by the year 2000 and would not only inhibit efforts by U.S. ports seeking cruise ship calls/homeporting opportunities but diminish the economies of existing U.S. homeports.

.. Eliminating the ability for a cruise operator to self insure using assets based in the United States denies passengers a tangible means of insuring the integrity of unearned passage revenue. It also weighs especially heavily against existing and prospective U.S.-flag operators. Both foreign-flag companies operating internationally and U.S.-flag companies operating in domestic trades must compete for the same U.S. customer base. Foreign-flag operators benefit from generous ship construction subsidies not available a U.S. domestic operator. To a modest degree, the current ability to self insure has provided U.S. domestic operators with a means to offset this advantage while adequately protecting passenger deposits.

.. As you also may be aware, steps have already been taken and significant efforts are underway to revitalize the U.S. merchant marine. An important component in this effort is the development of a U.S.-flag cruise fleet. The Title XI ship loan guarantee program has been funded after many years of dormancy. Two recent federal grants under the Maritech defense conversion program for the advanced design and marketing of U.S.-built cruise ships have been made with more expected. Pending maritime reform and cruise promotional legislation are also intended to assist in advancing the U.S.-flag cruise industry. The impact of the proposed requirement will add substantially to the already high capital costs of market entry and the ability to expand U.S. market share which the aforementioned efforts are intended to address. Consequently, the result of this proposal is directly in conflict with the clearly stated goals of Congress and the Administration.

The only companies able to handle the enormously increased capital requirements are the largest, foreign-flag companies which already have dominant market share. Thus this proposal can potentially reduce the spectrum of cruise operators by placing an unfair, and most importantly, unmanageable burden on smaller and mid-size companies. The end result will be fewer options for the consumers the proposal intends to protect.

The Institute strongly opposes this proposal and urges that the status quo be maintained or that implementation be indefinitely postponed until alternatives which can lead to the same goal without diminishing U.S.-flag opportunities are explored.

Sincerely,

James L. Henry

James L. Henry
President

JLH/tlh

LC: 020/030
50
60
022

ICCL

INTERNATIONAL COUNCIL
OF CRUISE LINES

RECEIVED

'94 JUN 24 [illegible]

June 24, 1994

[illegible]
OFFICE OF THE [illegible]

Mr. Joseph C. Polking
Secretary
Federal Maritime Commission
800 North Capitol St., N.W.
Washington, D.C. 20573

Carnival Cruise Lines
Celebrity Cruise Lines
Commodore Cruise Line
Costa Cruise Lines NV
Crown Cruise Line
Crystal Cruises
Cunard Line Ltd.
Dolphin Cruise Line
Epirotiki Lines
Fantasy Cruise Lines
Holland America Line
Majesty Cruise Line
Norwegian Cruise Line
Premier Cruise Lines, Ltd.
Princess Cruises
Regency Cruises, Inc.
Royal Caribbean Cruises, Ltd.
Royal Cruise Line
Royal Viking Line
Seabourn Cruise Line
[illegible]ne Cruises, Inc.
Windstar Cruises

Re: Docket No. 94-06
Financial Responsibility Requirements for Nonperformance of Transportation; Proposed Rule

The International Council of Cruise Lines (ICCL) is a non-profit trade association which along with its predecessor organization has represented the cruise industry since 1968. Our members have approximately 90% of the cruise industry berth capacity.

Background

Over the past four years, the Commission has diligently reviewed its financial responsibility requirements for nonperformance of transportation. In Fact Finding Investigation No. 19, the Commission conducted an investigation of the passenger cruise industry in order to establish a sound basis for a review of its financial responsibility requirements. The findings of that investigation demonstrated again the cruise industry's responsible financial performance to the American consumer:

- **"The industry has an almost impeccable record."[1]**
- **"Missed sailings are now a rare occurrence."[2]**
- **"Even when there are cancellations, cruise line operators have historically refunded or made alternative arrangements that have been acceptable to the affected passengers."[3]**
- **"The few times when there has been any need to utilize the security instrument on file with the Commission, the available funds have been**

1 Id. at 37
2 Id at 37
3 Id at 37

1211 Connecticut Avenue, N.W. . Suite 800 . Washington, D.C. 20036 (USA) . TEL (202) 296-8463 . FAX (202) 296-1676

more than sufficient to cover the claims."4

Indeed, the performance of the industry during the more than twenty-five years since the enactment of Public Law 89-777 is strong testimony to the industry's stability and its high sense of responsibility to the public.5

Public Perception

Despite this excellent track record, the ICCL and its members are not unmindful of the fact that the public perception is important.6 For example, although the traveling public was not actually at risk in the pm-packaged American Hawaii Cruises bankruptcy proceeding, a public perception of risk could affect ICCL members regardless of those members' actual financial posture. While we do not believe that the public interest requires amendment to the current financial responsibility requirements, we do believe that public perception of the industry could be enhanced by certain amendments, if properly balanced and implemented.

ICCL Recommendation

Accordingly, the ICCL and its members would support the Commission's alternative proposal contained in Docket No. 94-06 to require 110 percent coverage for up to $25 million in UPR per operator; coverage of 75 percent for UPR between $25 million and $50 million per operator; and 50 percent coverage for UPR over $50 million per operator so long as the Commission implements this significant change in increments over a reasonable period and at the same time implements a program of self insurance that is realistically available to operators who demonstrate a reasonably acceptable level of creditworthiness. In connection with these changes, we believe that several technical adjustments would also be in order. We believe that a proposal containing these features will receive wide spread industry support despite the strong financial safety track record described above.

---

4 Id at 37

5 In Docket No. 94-06, the Commission cites the bankruptcy of American Hawaii Cruises as a possible cause for concern. Although the Commission refers to this bankruptcy as an "involuntary" bankruptcy, our inquiry reveals that such proceeding was in fact a pre-packaged bankruptcy proceeding designed to insure the continued operation of American Hawaii's vessels. It was not an accident that no American Hawaiian passenger was affected by this proceeding and that the action resulted in no risk to the public. In fact, the event actually served as a successful example of one of the commercial protections which can help protect the public.

6 As stated in the Report to the Commission in Fact Finding Investigation No. 19, "operators are very aware that a reputation is a very valuable asset, and they seem to be willing to go beyond what is legally required to make sure that their passengers are satisfied." Id. at 6.

Timing

The timing of any increase in bonding coverage should be carefully considered. The Commission's alternative proposal calls for a dramatic and sudden increase in the amount of credit capacity that any operator, particularly the large operators, would be required to devote to this purpose. Like most responsible businesses, our member lines make their operating and financial plans many years in advance. This is particularly true for the construction of new ships, which have a long lead time from the time of contract signing to the time of delivery. Capital which could be suddenly required for purposes of bonding must, for many of our members, be diverted from contractual commitments already made. Due to such factors, any increase in the Commission's bonding requirements should be announced well in advance of its effectiveness, and progressively implemented over a multi-year period so that the considerable capital requirements it entails can be planned for and prudently managed by the operators.

ICCL and its members would support a schedule of increases in the existing sliding scale in an orderly manner which our members could responsibly plan for and accommodate, and would propose the following implementation schedule, using the existing sliding scale as a base:

1. Effective 5/30/95, eliminate the current ceiling of $15 million, and increase eligible UPR up to 100% up to $5 million, at 75% between $5 and $15 million, 50% between $15 million and $35 million and 25% above $35 million with no overall maximum.

2. Effective 5/30/96, cover eligible UPR at 100% up to $15 million, 75% between $15 million and $35 million and 50% in excess of $35 million.

3. Effective 5/30/97, cover eligible UPR at 110% up to $25 million, at 75% between $25 and $50 million, and at 50% over $50 million.

Self Insurance

In addition to an orderly implementation schedule, the Commission's proposed elimination of the current $15 million ceiling should also be accompanied by a program of self insurance that is realistically available to operators having a reasonably acceptable level of creditworthiness. The Commission's proposal in Docket No. 9406 to eliminate self-insurance does not take into account either the legislative intent of Public Law 89-777 or commercial reality.

The intent of Congress when it passed Public Law 89-777 was not to implement virtual guarantees, but to establish a reasonable level of financial responsibility

without placing a burden on responsible operators. Clearly, Congress envisioned that bonds or other forms of security would not have to be posted by all operators. Yet, because of the Commission's requirements relating to qualification for self-insurance, and now the Commission's proposal to eliminate self-insurance altogether (regardless of its current lack of reasonable accessibility) operators are given no alternative but to post a bond or provide other forms of security in order to satisfy Public Law 89-777. This is not what Congress intended.

The report issued to the Commission in Fact Finding Investigation No. 19 recognized that if self-insurance is to be a realistic option, the Commission needs to consider changes to its regulations.[7] Indeed, the report specifically stated that:

> should the Commission feel that some type of coverage above the $15 million ceiling is necessary, an equitable compromise would be to allow for self-insurance above the current ceiling.8

The biggest obstacle to the accessibility of self-insurance by creditworthy operators today under the Commission's regulations is the requirement that all assets be located in the United States. The primary assets of most operators are their cruise vessels, but because these vessels typically leave U.S. waters at some point during their cruises, these assets cannot under current regulations be included in the calculation of net worth.

The irony of this situation is that an operator's UPR is calculated based upon cruises that embark in the United States on vessels that, by definition, will enter U.S. waters on a periodic basis. Indeed, the majority of cruise ships are in U.S. waters one or more days a week on a year round basis.

The purpose of establishing financial responsibility through self-insurance is not to place restrictions on an operator's ability to deploy its assets or to ensure that a pool of assets be located in the United States. Indeed, Public Law 89-777 does not contain any such restriction. Instead, the purpose is to measure whether the operator has sufficient financial strength to honor its commitments. A company's creditworthiness is determined by investors, lenders and all other corporate constituencies independently of the physical location of its assets. This is a principle long accepted by commercial bankers and Wall Street.

Accordingly, we propose that the Commission revise its self-insurance regulations by eliminating the requirement that all assets be located in the U.S. Of course, we would have no objection to a requirement that eligible operators agree to U.S. jurisdiction in any passenger performance disputes with its U.S. passengers and appoint a U.S. agent for service of process in this connection.

---

[7] Fact Finding Investigation No. 19, Passenger Vessel Financial Responsibility Requirements, Report to the Commission at p. 39.

[8] Id. at 38.

In the report issued to the Commission in Fact Finding Investigation No. 19, a concern was raised concerning the reliability of a cruise line's net worth as reflected in its financial statements on the basis of the possibility that in a depressed economy, fixed capital assets may not be able to be liquidated at their book values. While there is some basis for this concern, it is an issue that can be easily addressed. We propose that the self-insurance net worth test be based on tangible net worth and be increased from 110% of UPR to 300% of UPR This provides a margin for error in the event that asset values decline. We note, however, that actual experience in the sale of cruise ships evidences a history of cruise ship sales in excess of book value. In order to provide additional comfort, we propose that a liquidity test (cash plus undrawn committed credit facilities) of 100% for the first $25 million in UPR, and 50% of UPR above $25 million be added to the self insurance requirement, without restriction on location of the funds in the U.S. In order to support evidence of self-insurance, we propose that qualified cruise lines would report their financial condition on a quarterly basis. These would be certified on a quarterly basis by the line's Chief Financial Officer and on an annual basis by the line's independent public accountant.

In Public Docket 94-06, the Commission raises a concern relating to reliance totally on a net worth test for self-insurance. The Commission notes that other liens may attach to the operator's assets that have a higher priority. While this is true, we note that the purpose of Public Law 89-777 is not to provide a virtual guaranty to the public. As stated in the report to the Commission in Fact Finding Investigation No. 19:

> The Commission has consistently interpreted the statute as requiring financial responsibility, not financial guaranty.9

The theoretical concern for priority liens should not be the basis for denying a realistic option of self-insurance as a means of establishing financial responsibility for creditworthy operators. The experience of the almost three decades since the passage of Public Law 89-777 should be convincing proof that there are a number of responsible, creditworthy operators that ought to to be able to meet the financial responsibility requirements without having to post a bond or other form of security, especially if the long standing practice of a ceiling on this level of security is eventually removed.

Additional Technical Adjustments

Due to the substantial increases in the bonding requirements that are being recommended, we propose that the financial responsibility requirement regulations be adjusted to provide that within 60 days of a request by any bonded entity (which request may be made no more than once in any twelve month period), the

9 Id at 15.

Commission will allow a reduction in the required bonding level in order to reflect changes in the company's operations (e.g., the sale of a vessel or changes in itinerary) that result in a material reduction in UPR on an ongoing basis, as and when such reduction occurs. Such an amendment would be appropriate in order to avoid any undue burdens on au entity that reduces its UPR below historical levels.

In addition, we propose that the bonding requirement and self-insurance tests be applied to the appropriate parent or bonding company of the cruise operator which ultimately has the financial responsibility for the cruise operator.

Conclusion

In summary, the ICCL and its members stand on our exemplary record to the public. We support the Commission's alternative proposal to remove the current $15 million ceiling and to implement a sliding scale, so long as the Commission implements this fundamental and significant change over a reasonable and orderly phase-in period and amends its self-insurance requirements to make self-insurance reasonably available to creditworthy operators.

It is important for us to again reiterate how effective the cruise industry has operated over the almost three decades since Public Law 89-777 was enacted. The public has not lost a single dollar of passenger deposits since the law went into effect. The industry has, in fact, been an outstanding model for providing excellent value and service to the traveling public.

Respectfully submitted,
John T. Estes
President

CC: 020/030
50
60
022

RECEIVED

'94 JUN 24 AM 7:5

FEDERAL MARITIME COMMISSION
OFFICE OF THE SECRETARY

June 23, 1994

PASSENGER VESSEL ASSOCIATION

808 17th Street, NW,
Suite 200
Washington,
DC 20006-3910

Fax
(202) 785-0540

(202) 785-0510

formerly
the National
Association
of Passenger
Vessel Owners

Mr. Joseph Polking
Secretary
Federal Maritime Commission
800 North Capitol Street N.W.
Washington, D.C. 20573

RE: Proposed Rule Change - Docket No. 94-06

Dear Secretary Polking:

The Passenger Vessel Association appreciates the opportunity to comment on Docket Number 94-06, the proposed rule change regarding unearned passenger revenue reserve requirements for passenger vessel operators.

The Passenger Vessel Association is a 500 member trade association of owners, operators and suppliers of U.S.-flag passenger vessels. Our member companies today operate some 1,200 vessels and carry about 80 million people each year. Among the members we represent are the American companies which offer overnight cruises, all on U.S. built, U.S. crewed, U.S.-flag vessels. With the exception of one company, these companies all are small, generally family owned businesses whose vessels range in size from 49 to 138 passengers. They operate these vessels on popular itineraries throughout the Americas, from Venezuela to Alaska. The other company, Delta Queen Steamboat Company, operates larger vessels with a long history of quality service and financial success.

The rule proposed in Docket Number 94-06 would impose a significant financial hardship on our members who operate overnight passenger cruises, all of whom already are burdened by the high cost of flying the U.S.-flag. These few companies, which represent the only American presence in the cruise ship industry worldwide, struggle to make a profit in the face of higher costs emanating from U.S. labor costs, U.S. income taxes, and U.S. Coast Guard certification standards, both construction and operating. The full costs associated with these requirements are not borne by the foreign competition, which, of course, is one reason foreign-flag vessels dominate the cruise ship business, even that which exists out of United States ports.

In addition to imposing a new cost on these companies, the proposed rule also would restrict the working capital available to them to run and expand their

businesses. These are not companies with multiple (much less multinational) lines of credit. For the most part, these are companies that rely on earnings for maintenance and repair, vessel replacement, fleet expansion and the myriad of other things that comprise a dynamic business.

Unlike the large, foreign controlled corporations whose assets are based in and owned by interests beyond the reach of U.S. law, the companies in whose behalf we write are American companies. Their assets are based and registered in the United States and their owners are U.S. citizens living in the United States. The FMC lumps "apples with oranges" to treat the two alike, with disproportionate harm suffered by the Americans.

Nearly two years ago, the FMC reviewed its regulations with respect to unearned passenger revenue reserve requirements applicable to passenger vessels operators in the event of nonperformance of transportation. The FMC concluded after this review that its existing regulations satisfied the requirements of the law and no additional requirements were necessary. In light of this, it is unclear why the rule change proposed by Docket Number 94-06 was promulgated.

We are not aware that any other mode of transportation is similarly encumbered by a reserve requirement of this sort. Dozens of other commercial activities which commonly require advanced bookings occur each day without the government putting in place an insurance system for the purchaser if the activity fails to take place. In view of this, the increase in revenue reserve requirements attaching to passenger vessels - particularly one of the magnitude contemplated - seems without merit.

It also appears to fly in the face of the President's "Principles of Regulation", as embodied in Executive Order 12866. This document outlines the kind of regulatory system the President has said the American people deserve, but also concludes that "we do not have such system today". The order deems "consistency, predictability, the costs of enforcement and compliance, flexibility, distributive impact and equity" to be the standards against which regulations should be judged. We believe the rule change proposed here fails to meet this test.

At a time when Congress is seriously considering legislation to revive the large cruise-ship fleet flying the U.S.-flag, it seems at cross-purposes for the FMC to put forward a proposal that would have the opposite effect. We urge the FMC to consider the impact of the rule change proposed by Docket Number 94-06 and elect to withdraw the proposal.

Sincerely,

Eric G. Scharf
Executive Director

Passenger Vessel Association

June 23, 1994

PASSENGER
VESSEL
ASSOCIATION

Mr. Joseph Polking
Secretary
Federal Maritime Commission
800 North Capitol Street N.W.
Washington, D.C. 20573

RE: Proposed Rule Change - Docket No. 94-06

Dear Secretary Polking:

The Passenger Vessel Association appreciates the opportunity to comment on Docket Number 94-06, the proposed rule change regarding unearned passenger revenue reserve requirements for passenger vessel operators.

808 17th Street NW
Suite 200
Washington,
DC 20006-3910

Fax
(202) 785-0540

(202) 785-0510

The Passenger Vessel Association is a 500 member trade association of owners, operators and suppliers of U.S.-flag passenger vessels. Our member companies today operate some 1,200 vessels and carry about 80 million people each year. Among the members we represent are the American companies which offer overnight cruises, all on U.S. built, U.S. crewed, U.S.-flag vessels. With the exception of one company, these companies all are small, generally family owned businesses whose vessels range in size from 49 to 138 passengers. They operate these vessels on popular itineraries throughout the Americas, from Venezuela to Alaska. The other company, Delta Queen Steamboat Company, operates iarger vessels with a long history of quality service and financial success.

The rule proposed in Docket Number 94-06 would impose a significant financial hardship on our members who operate overnight passenger cruises, all of whom already are burdened by the high cost of flying the U.S.-flag. These few companies, which represent the only American presence in the cruise ship industry worldwide, struggle to make a profit in the face of higher costs emanating from U.S. labor costs, U.S. income taxes, and U.S. Coast Guard certification standards, both construction and operating. The full costs associated with these requirements are not borne by the foreign competition, which, of course, is one reason foreign-flag vessels dominate the cruise ship business, even that which exists out of United States ports.

Formerly
the National
Association
of Passenger
VesselOwners

In addition to imposing a new cost on these companies, the proposed rule also would restrict the working capital available to them to run and expand their

businesses. These are not companies with multiple (much less multinational) lines of credit. For the most part, these are companies that rely on earnings for maintenance and repair, vessel replacement, fleet expansion and the myriad of other things that comprise a dynamic business.

Unlike the large, foreign controlled corporations whose assets are based in and owned by interests beyond the reach of U.S. law, the companies in whose behalf we write are American companies. Their assets are based and registered in the United States and their owners are U.S. citizens living in the United States. The FMC lumps "apples with oranges" to treat the two alike, with disproportionate harm suffered by the Americans.

Nearly two years ago, the FMC reviewed its regulations with respect to unearned passenger revenue reserve requirements applicable to passenger vessels operators in the event of nonperformance of transportation. The FMC concluded after this review that its existing regulations satisfied the requirements of the law and no additional requirements were necessary. In light of this, it is unclear why the rule change proposed by Docket Number 94-06 was promulgated.

We are not aware that any other mode of transportation is similarly encumbered by a reserve requirement of this sort. Dozens of other commercial activities which commonly require advanced bookings occur each day without the government putting in place an insurance system for the purchaser if the activity fails to take place. In view of this, the increase in revenue reserve requirements attaching to passenger vessels - particularly one of the magnitude contemplated - seems without merit.

It also appears to fly in the face of the President's "Principles of Regulation", as embodied in Executive Order 12866. This document outlines the kind of regulatory system the President has said the American people deserve, but also concludes that "we do not have such system today". The order deems "consistency, predictability, the costs of enforcement and compliance, flexibility, distributive impact and equity" to be the standards against which regulations should be judged. We believe the rule change proposed here fails to meet this test.

At a time when Congress is seriously considering legislation to revive the large cruiseship fleet flying the U.S.-flag, it seems at cross-purposes for the FMC to put forward a proposal that would have the opposite effect. We urge the FMC to consider the impact of the rule change proposed by Docket Number 94-06 and elect to withdraw the proposal.

Sincerely,

Eric G. Scharf
Executive Director

CC:222/052

ORIGINAL

50
60

RECEIVED

'94 JUN 24 P4:15

FEDERAL MARITIME COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE FEDERAL MARITIME COMMISSION
Washington, D.C.

FINANCIAL RESPONSIBILITY REQUIREMENTS FOR NONPERFORMANCE OF TRANSPORTATION	:	**Docket No. 94-06**

COMMENTS OF AMERICAN CLASSIC VOYAGES CO. (FORMERLY THE DELTA QUEEN STEAMBOAT CO.)

William N. Myhre
Alan J. Schaeffer
PRESTON GATES ELLIS & ROUVELAS MEEDS
1735 New York Avenue, N.W.
Suite 500
Washington, D.C. 20006
(202) 628-1700

Attorneys for
American Classic Voyages Co.

Date: June 24, 1994

TABLE OF CONTENTS

Page

BEFORE THE FEDERAL MARITIME COMMISSION
Washington, D.C.

FINANCIAL RESPONSIBILITY REQUIREMENTS FOR NONPERFORMANCE OF TRANSPORTATION	:	Docket No. 94-06

COMMENTS OF AMERICAN CLASSIC VOYAGES CO.
(FORMERLY THE DELTA QUEEN STEAMBOAT CO.)

INTRODUCTION

American Classic Voyages Co. ("AMCV" or the "Company"), formerly known as The Delta Queen Steamboat Co. and now the corporate parent of The Delta Queen Steamboat Co. ("Delta Queen") and American Hawaii Cruises ("AHC"), hereby submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") published by the Federal Maritime Commission (the "Commission") on March 31, 1994. 59 Fed. Reg. 15149. This proposal would make significant changes to the Commission's regulations concerning the requisite evidence of financial responsibility for nonperformance of transportation and the related issuance of a Performance Certificate. 46 C.F.R. Part 540.

As set forth below, AMCV has serious concerns with the proposed rulemaking and does not believe that the suggested changes are warranted. Should the Commission conclude otherwise, however, after a complete and reasoned analysis of the comments and the relevant facts, AMCV also suggests certain alternative measures for the Commission's consideration.

SUMMARY OF POSITION

The Commission's proposal to eliminate entirely both (1) the current ceiling on coverage of unearned passenger revenue ("UPR") (together with adjustments to the sliding scale), and (2) the self-insurance option came as a complete shock to the cruise industry in general' and to AMCV in particular. As the Commission is well aware, compliance with the Performance Certificate regulations has been a critical factor in AMCV's growth plans over the past two or three years, both in acquiring the AHC vessels and in constructing a new vessel. Because Delta Queen is the only commercial operator that has qualified for self-insurance it also has a unique stake in the outcome of this proceeding.

The principal concern with the NPRM is that it marks a fundamental change in the Commission's interpretation of Section 3 of Public Law 89-777, 46 App. U.S.C. 817e ("P.L. 89-777"). Not only is it the most far reaching regulatory proposal since the statute was enacted, but, in addition, it completely reverses well-established interpretations and regulations that were adopted after a thorough fact-finding investigation, public hearings, full notice and comment rulemaking and even an act of

---

[1] See James Santo, Potential Nishtmare for Cruise Lines, Tour & Travel News, Apr. 4, 1994 (quoting one cruise industry representative: "I'm absolutely astonished at what's going on here. We went through this ad nauseam for two years, with hearings in New York, Los Angeles, Miami and Washington, and brought in all sorts of witnesses. It doesn't seem proper that you can spend 18 months getting something sorted out and bingo, you're right back to where you started.")

Congress. Rather than facilitating an inquiry of an operator's financial responsibility to perform the transportation, the current proposal will, for the first time, effectively require a auarantv of virtually every dollar of UPR, regardless of the operating history or financial wherewithal of the operator or the practice in competing industry sectors. This is the practical effect of removing both the coverage ceiling and the self-insurance option. As explained below, all of the remaining options for establishing financial responsibility contemplated in the regulations (to the extent the option is available at all) require full cash collateralization.

The practical impact on the cruise industry will be significant and adverse. The full-collateralization requirement will put a very substantial burden on all operators by sharply reducing cash flow and impairing the ability of the operators to make capital improvements and otherwise to function with the same flexibility as their competitors in other travel and vacation markets. While these burdensome "over-collateralization" requirements may be endurable for the larger companies, the remaining operators will be forced to examine whatever other alternatives exist, if any. The chairman of Carnival Cruise Lines, the industry's largest cruise ship operator, summarized the reality of this proposal in the trade press as follows:

> I have the cash on hand or the borrowing capabilities, but I think I am in a unique position in being able to say that. I think there are some companies that would find this

devastating, and I don't think that's too strong a word.[2]

Faced with this kind of burden most companies will need to consider all options, including relocating base operations to nearby foreign ports to avoid the Commission's jurisdiction. Because these operators will still draw from the same North American cruise market, however, this development would have the counter-productive effect of allowing these companies to operate without any Performance Certificate, leaving their passengers with no coverage at all.

While the largest cruise line, a foreign company operating foreign-flag vessels, will benefit by the elimination of competitors "devastated" by the proposal, those hardest hit will be U.S. companies, like AMCV. Not only are they in the more vulnerable group, but unlike their foreign competitors, U.S. companies will also lose the self-insurance option. Because self-insurance is available only to those with substantial U.S.-based assets, its elimination will hit only U.S.-based companies. U.S.-flag operators are already at a disadvantage with respect to their foreign-flag competitors. They face high corporate income tax (from which foreigners are exempt), as well as significantly higher labor and capital costs. The Commission's proposal will cost U.S. operators one of their few advantages -- self-insurance. It will be a particularly heavy blow to the U.S.-flag cruise industry which only recently has begun a resurgence.

---

[2] Id. (emphasis added).

The proposed changes would be more understandable had there been any evidence of a problem. But there is not a single example in the nearly thirty years since P.L. 89-777 was enacted of a passenger failing to recover a fare or deposit in the event of nontransportation. The statute, as currently administered, has provided a means of weeding out the irresponsible operators, thus protecting the public from the fly-by-night companies that led to the enactment of the statute in the first place. Moreover, even if there were a problem, the travelling public's risk of actual loss is further mitigated by existing protections for those who purchase cruises by credit card, as some 95% of the travelling public does,[3] as well as the availability of private insurance.

When measured against this backdrop, AMCV finds no reason to change the existing system. With a perfect track record in protecting the public, the Commission should not undertake changes that will substantially burden the industry, with little or no benefit to the public and the potential for actually increasing the risk to the public should operators shift to departures from nearby foreign ports.

Before the Commission takes any further action on these proposals, it should undertake a substantive investigation and analysis similar to that which resulted in the current rules. Should the Commission nonetheless decide to proceed, however,

---

[3] Fact Finding Investisation No. 19 - Passenger Vessel Financial Responsibility Requirements, Report to the Commission (April 11, 1991)(hereinafter, the "Ivancie Report") at 3.

AMCV suggests two alternatives (in addition to the retention of self-insurance) to provide a more reasonable way to address the "theoretical gap"[4] in overall coverage.

One alternative would be to address any theoretical shortfall the same way such risks are dealt with in other industries, that is, through public disclosure requirements and individual insurance. Cruise operators could be required to advise their passengers of the level of UPR coverage they have established with the Commission. In addition to disclosure, they could also be required to inform travellers of the individual insurance coverage presently available. This would allow the travelling public to weigh the industry's perfect record against the cost of additional insurance and make their own insurance selection in much the same way a rental car customer currently does when renting a car. In this manner, the travelling public will continue to enjoy its current high level of protection, but without having to shoulder the burden of 100% guaranties. For those travellers who want to pay for the dollar-for-dollar guaranty, it would continue to be available in the private market.

Another alternative would be to initiate a new rulemaking to consider other options, including basing coverages on the number of berths per operator. This would help close both the "gap" and remove the disparity in coverage requirements between larger and smaller operators that exists under current regulations. Other

---

[4] See, e.g., Ivancie Report at 37.

options include tying any increase in the coverage ceiling to the consumer price index as the Commission has done in the past and retaining self-insurance but increasing the percentage of UPR required as a function of net worth.

BACKGROUND OF AMERICAN CLASSIC VOYAGES

AMCV, a Delaware corporation listed on the NASDAQ Stock Exchange, is the leading provider of overnight passenger cruises on inland waterways in the continental United States and among the Hawaiian Islands. AMCV operates Delta Queen, which, with the two U.S.-flag vessels, the DELTA QUEEN and the MISSISSIPPI QUEEN, having 596 total passenger berths, provides three to twelve-night paddle-wheel driven steamboat cruise vacations on the Mississippi, Ohio, Cumberland, Atchafalaya and Tennessee Rivers. Delta Queen's sister company, AHC,[5] operates the only two ocean-going U.S.-flag cruise liners, the CONSTITUTION and the INDEPENDENCE, having 1,526 total passenger berths, on three, four and seven-night cruises among the Hawaiian Islands.

Delta Queen has been an active participant in the Commission's recent rulemakings concerning the Performance Certificate requirements[6] and, on April 29, 1993, qualified as a self-insurer with respect to the operation of its two riverboats. Delta Queen far exceeded the Commission's net worth requirements and is the first and only commercial company to use the self-

---

[5] Approximately 80% of the stock in AHC is held by AMCV.

[6] See discussion infra, Section I.C, p. 15.

insurance option to meet the Commission's regulations.[7] Previously, Delta Queen qualified under 46 C.F.R. Part 540 with an escrow account, which had proven to be cumbersome and impracticable. With the self-insurance approval, the Company was able to devote the funds that previously were committed to secure the escrow arrangements toward re-investing in the U.S. merchant marine through the construction of the AMERICAN QUEEN, a new $65 million, 420-passenger steamboat which is scheduled to be delivered from a Louisiana shipyard next year.

Last August, with the acquisition of the CONSTITUTION and the INDEPENDENCE, the Company took over the obligation of the vessels' previous owners to indemnify passengers and supplied the Commission with a guaranty underwritten by The Steamship Mutual Underwriting Association (Bermuda) Ltd. in the amount of $15 million.[8] The Company believes that at all times the potential value of the Company always exceeded UPR and therefore passenger's funds were not at risk.

At the same time, the Company announced plans to invest an aggregate amount of $60 million in the refurbishment and upgrading of the two AHC vessels. The project will include structural repairs and machinery replacement, hotel work,

---

[7] By letter dated April 29, I993 from Joseph C. Polking, Secretary to the Commission, to Steven Isaacson, Chief Financial Officer of Delta Queen, the Commission approved the company as a self-insurer.

[8] See Certificate Nos. P-200 and P-446, issued to Great Hawaiian Properties Corp. (d/b/a American Hawaii Cruises) and Great Hawaiian Cruise Lines, Inc. for the INDEPENDENCE and the CONSTITUTION, respectively.

including cabin and public space renovation, and upgraded air conditioning, electrical and pollution control systems. The work is scheduled to begin on the INDEPENDENCE on July 19, 1994 at Newport News Shipbuilding in Virginia with the vessel returning to Hawaiian service in October. It is anticipated that the second vessel will go into the shipyard shortly thereafter.

With the successful transition of the AHC vessels from their previous owners and the profitable operation of the overall fleet, the Company filed an application on February 24, 1994 to consolidate its evidence of financial responsibility for all four vessels under the self-insurance option provided in the Commission's regulations. 46 C.F.R. §540.5(d). In support of its application, the Company provided evidence of its perfect operating history regarding claims for nonperformance. In addition, the Company evidenced that as of December 31, 1993, it had a net worth of $84,786,000 or 184%[9] of its highest level of UPR within the previous two years ($45,990,000), once again far exceeding the Commission's 110% requirement. Less than one month later the Commission commenced the current rulemaking proceeding. The Company's application is still awaiting Commission action.

[9] This calculation was conservatively based on the book value of the vessel assets. Had the more realistic fair market value of the vessels been used this percentage would be far higher.

DISCUSSION

I. THE STATUTE AND WELL-ESTABLISHED COMMISSION INTERPRETATION REQUIRE EVIDENCE OF FINANCIAL RESPONSIBILITY BUT NOT A FINANCIAL GUARANTY

A. The statute is directed at the particular problem of "fly-by-night" operators and provides for appropriately narrow relief to guard against them

The statutory basis for the Commission's proposal is P.L. 89-777, which was enacted in 1966 for an express objective: "to protect against passengers being stranded when a vessel fails to make its contracted sailing." S. Rep. No. 1483, 89th Cong. 1st Sess. 1 (1966), reprinted in 1966 U.S.C.C.A.N. 4176. In its report, the Senate Commerce Committee cited two instances "where prospective passengers were left stranded on the pier owing to the cancellation of scheduled sailings." Id. at 4179. In both cases, most of the passengers had no recourse to recover money paid in advance since the vessels were documented under foreign flag and the charterers of the vessels had either disappeared or spent the fares. See Ivancie Report at 9.

Congress responded by enacting an appropriately tailored statutory scheme designed to protect the travelling public from fly-by-night "operators of questionable financial responsibility," but without financially over-burdening reputable vessel operators.[10] Congress evidenced this intent in the

---

[10] See H.Rep. No. 1089, 89th Cong., 1st Sess. 2 (1965) and Coastwise Cruise Regulations; Testimony of then-Chairman of the Commission, Admiral Harllee, Hearings Before the Subcommittee on Merchant Marine of the House Committee on Merchant Marine and Fisheries, 89th Cong., 1st Sess. 70-71, cited in the Ivancie Report at 10-11.

express terms of the statute which provides for a flexible system:

> [No person shall offer transportation] without there first having been filed with the Federal Maritime Commission such information as the Commission may deem necessary to establish the financial responsibility [of the person]... or in lieu thereof, a copy of a bond or other security, in such form as the Commission, by rule or regulation, may require and accept...

46 App. U.S.C. § 817(e)(emphasis added).

Far from requiring any kind of suarantv of payment in the event of nonperformance, the system Congress fashioned begins with nothing more than the filing of information sufficient for the Commission to determine whether vessel operators are responsible companies that would not leave passengers stranded. Only as an alternative procedure does the statute provide that "in lieu" of such information, the Commission could require a bond or other security. Id. This may also be the preferred alternative for some privately held vessel operators who, given the enormous competition in the cruise industry, would prefer a bond, at reasonable levels, rather than subjecting company books to public scrutiny.

The legislative history makes clear that Congress recognized that many vessel operators in the cruise business were financially responsible and that bonds or other security would be required only as an alternative:

> This section provides for the filing of evidence of financial security or in the alternative a copy of an acceptable bond or other security because many persons operating in the cruise business are responsible and maintain sufficient assets in this country which could be proceeded against.

S. Rep. No. 1483, 1966 U.S.C.C.A.N. 4176, 4182 (emphasis added).

In paragraph (b) of Section 3 (46 App. U.S.C. § 817e(b)), Congress set out certain specifics for the bonding arrangements, should the Commission choose to offer the bonding alternative. Only there, in the limited context of a bond, was there ever any suggestion that dollar-for-dollar coverage might be required. Significantly, the Commission recognized the ambiguity of the provision and has never read the language as requiring such coverage. Indeed, after its investigation and rulemakings in this area, the Commission requested that Congress delete those provisions and Congress obliged. See Pub. L. 103-206, 107 Stat. 2427 (1993).

B. Congress recently amended the statute to clarify that financial responsibility, not financial guaranty is required

Any lingering question as to Congressional intent vis-a-vis full dollar-for-dollar coverage was clearly put to rest last December, when Congress expressly deleted from the statute the only language that could have been read to require full coverage. Pub. L. 103-206, Title III, Section 320, 107 Stat. 2427 (1993) (deleting language requiring bonds to "be in an amount paid equal to the estimated total revenue for the particular transportation"). The suggestion to delete this particular language was made by the Commission itself and explained by Chairman Hathaway during hearings before the House Subcommittee

on Merchant Marine just last year." In response to a question about the proposed deletion, Chairman Hathaway confirmed that the Commission's interpretation of the statute was certainly not that it required dollar-for-dollar coverage:

> Under Section 3[a] of the Act concerning Passenger Vessel Financial Responsibility, we [the Federal Maritime Commission] are responsible for making sure that the passenger vessel companies have enough security to assure us that if for some reason they don't sail, that people will get their money back. 3[a] says that we can require whatever information, bond or other security that we find is reasonable.
>
> But section 3[b] says that if a bond is required--and in line with that, we have increased the maximum amount from $10 million to $15 million--the bond has to be in an amount equal to the estimated total revenue for the particular transportation. That could run up to about $100 million. We don't think that the Congress intended that, because it gives us in section 3[a] discretion to determine reasonable security. If we felt that they were secure just by looking at their balance sheet, I suppose we could say, **Well, OK. You can go ahead."
>
> It has been our custom to accept a bond, but to require coverage of that amount--say, of $100 million--I think would be far beyond what the Congress actually intended. And so last year all of us agreed--all the Commissioners and they are here today--that we could strike the last few words from section 3(b)--.

FMC and MARAD Authorizations, FY 1994 Hearings at 7 (emphasis added).[12]

---

[11] FMC and MARAD Authorizations, FY 1994, Hearings Before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries, 103d Cong., 1st Sess. 7 (1993).

[12] Chairman Hathaway's reference to the prior year's agreement of the Commissioners reflects the Commission's unchanged position from 1992, which is also reflected in the House Committee on Merchant Marine and Fisheries Report on the FMC Authorization Act of 1992:

(continued...)

Chairman Hathaway's testimony, as is discussed more fully below, reflected what was by then the well-established position of the Commission: full dollar-for-dollar coverage was neither intended nor warranted. Yet, less than one year after this testimony was presented to Congress, the Commission has proposed an "about face" and initiated a rulemaking that essentially would require dollar-for-dollar coverages in the amount of $100 million and beyond and that would eliminate in its entirety the self-insurance option, thus preventing the Commission from relying on any company's balance sheet, regardless of how strong.[13]

---

[12](. ..continued)
The Committee agreed to an amendment...amending section 3(b) of Public Law 89-777 that clarifies the bonding requirement for the protection of passengers in the event of the cancellation of a cruise trip. The amendment was requested by the Federal Maritime Commission to remove extraneous statutory language and will not change any of the current requirements protecting passengers.

H.R. Rep. No. 102-495, 102d Cong., 2d Sess. 3 (1992).

[13] For example, The Walt Disney Company recently announced plans to enter into the cruise business. Ted Reed, Disnev to Enter Cruise Business With Fla.-Based Ship as Early as '98, J. of Comm., May 9, 1994, at 7B. This is a company with substantial U.S. assets and a strong balance sheet -- showing net worth in excess of $5.7 billion -- yet under the Commission's current proposal, even this company would not be able to evidence that it was financially responsible unless it obtained a surety bond or one of the other instruments acceptable to the Commission in lieu of the obvious information establishing its financial wherewithal to make good on passengers' claims. See 1993 Annual Report of The Walt Disney Company at p. 45.

c. After a full fact finding investigation and repeated rulemakings the Commission has continuously interpreted the statute as requiring financial responsibility, not an unconditional guaranty

In little more than four years, the key issues in this proposed **rule have been the subject not only of an act of Congress but also nine separate Federal Register notices, five separate Commission Docketed proceedings, one full Commission Fact Finding Investigation involving three public hearings held nationwide, and dozens of public** comments.[14] **In this process, the central questions of the current rulemaking have been addressed, analyzed, commented on by the public and decided. In each case the final decision has supported the concept that P.L. 89-777 requires financial responsibility of the passenger vessel operator, not unconditional guaranties of total UPR. Moreover, with respect to the two fundamental issues which are the subject of the current rulemaking -- elimination of the ceiling (together with the related adjustment of the sliding scale) and elimination of the self-insurance option -- the Commission has already addressed each, and in each case has come to a decision at complete odds with the current proposal.**

1. The Ceiling

Over four years ago, when the current round of rulemakings began, the Commission proposed in Docket No. 90-01 to eliminate the ceiling (then $10 million) in favor of requiring all applicants to provide coverage of 110% of UPR, no matter how

[14] See **Federal Register Notices in Docket Nos.** 90-01; 91-32; **92-19; and 92-50.**

sizable that number and no matter how financially sound the applicant. 55 Fed. Reg. 1850 (Jan. 19, 1990). Having encountered significant opposition to this proposal, as evidenced by the comments submitted, the Commission instead decided to retain the ceiling, but to increase it to $15 million. 55 Fed. Reg. 34564 (Aug. 23, 1990). The concerns raised by the commenters were so significant that the Commission also decided to initiate a comprehensive fact finding investigation "to collect, review and analyze information pertaining to the cruise industry" for the express purpose of "establish[ing] a sound basis for review of current FMC regulations." Order of Investigation (FF-19), 55 Fed. Reg. 34610, 34611 (Aug. 23, 1990).

Seven months later, upon completion of the investigation and several field hearings, the Investigative Officer, Commissioner Francis J. Ivancie, found the record to be "devoid of any compelling evidence that warrants an increase of our current $15 million ceiling," and flatly concluded that an increase was "not justified.*' Ivancie Report at 25, 37.

The Ivancie Report could not have stated the Commission's position more clearly:

> The Commission has always interpreted Section 3 as mandating a reasonable ceiling on the size of the security required of a cruise operator....The Commission has consistently interpreted the statute as requiring financial resnonsibilitv, not financial guarantv. The Commission has also recognized that a dollar-for-dollar bonding requirement would unnecessarily increase an operator's cost of doing business.

* * *

> If the Commission were to reauire a dollar-for-dollar coverage for insurance, escrow, guaranty, or surety bonds, it would be departing from its established policv with no reasonable justification. Costs would be raised and the individual passenger's protection would not necessarily be increased.

Ivancie Report at 15 (emphasis added).

Not surprisingly then, the Ivancie Report seemed to put to rest any discussion of eliminating the ceiling (that is, until the current rulemaking). In fact, when the Commission instituted the rulemaking to implement the Ivancie Report in Docket No. 91-32, it even considered whether the ceiling should be lowered. 56 Fed. Reg. 40586, 40587 (Aug. 15, 1991). The following year, when the Commission published a Notice of Proposed Rulemaking in Docket No. 92-19 and eventually adopted a final rule in yet another proceeding on these issues, it again decided to retain the ceiling, finding a further revision to be "unwarranted." 57 Fed. Reg. 19097, 19098 (May 4, 1992). Once again recognizing that the statute called for evidence of financial responsibility and not a financial guaranty, the Commission concluded that even though the $15 million ceiling did not provide passengers with dollar-for-dollar coverage:

> this ceiling appears to strike a reasonable balance between Public Law 89-777's objective of protecting passengers and the requirements this legislation imposes on the cruise line industry.

Id.

Still concerned that the ceiling could impose too heavy a burden "on certain operators with UPR at or near the ceiling that could be disproportionate to their potential risks of failure,"

the Commission then proposed a more lenient sliding scale which was eventually adopted. Id.; 57 Fed. Reg. 41887 (Sept. 14, 1992).

2. Self-Insurance

Like the UPR ceiling issue, the self-insurance issue has been the subject of considerable attention by the Commission over the past several years. And like the ceiling issue, the rulemakings, public comment and the Commission's decisions have all been in a consistent direction, that is, toward liberalizing the self-insurance requirements in order to make them realistically available to the cruise industry.

This issue surfaced during Commissioner Ivancie's investigation, where it was found to be of concern to most of the cruise lines. Ivancie Report at 28. Also finding that only two entities took advantage of the self-insurance option, the Ivancie Report concluded that if self-insurance were to be a realistic option, changes would have to be made. Accordingly, the Ivancie Report recommended that the Commission liberalize the self-insurance rules. Id. at 38-40. Since that recommendation was made, self-insurance has been addressed in three docketed proceedings (Docket Nos. 91-32; 92-19; and 92-50), and in each one, the objective has been to find a workable formulation so that self-insurance could become a realistic option. While several additional safeguards were adopted, such as requiring the self-insurer's assets to be located in the United States, at no

time was there any suggestion that the self-insurance option be eliminated altogether.

D. The proposed rules reverse the Commission's current rules and effectively require a 100% dollar-for-dollar guaranty

As is evidenced above, the Commission has consistently and deliberately interpreted P.L. 89-777 in such a manner as to require vessel operators to be financially responsible, but not to require them to unconditionally guaranty total UPR in every conceivable circumstance. The proposed rule marks a clear and dramatic departure from the Commission's previous application of the statute. Far from "tinkering" with the requirements, as was suggested at the commencement of this proceeding, the proposed elimination of the ceiling and termination of the self-insurance option fundamentally alters the application of P.L. 89-777 in a way that, as shown below, will have significant consequences for the industry and the travelling public alike.

The most fundamental and far reaching change is that the proposal, for all practical purposes, eliminates any option to evidence financial responsibility in any manner other than those that require dollar-for-dollar coverage. As a result, the Commission's long-standing position of requiring responsibility, not guaranties, is reversed, because of the five options provided in the regulations, only two are realistically available and both require 100% collateral:

* insurance is not commercially available;

* self-insurance will be terminated if the proposed rule is adopted:
* the escrow account is so cumbersome and impracticable for this industry as to be unworkable (while effectively requiring full cash collateral in any event); and
* the two remaining options -- guaranties and surety bonds -- both require full cash collateral.

Adoption of the current proposal, therefore, without any ceiling on coverage, will effectively create a very fundamental shift in a system where every vessel operator will be required to provide an unconditional, dollar-for-dollar guaranty for total deposits for every passenger.

1. Guaranties and surety bonds must be fully collateralized and therefore are not feasible at unlimited levels

Most passenger vessel operators meet their Section 3 obligations with either a surety bond or a guaranty, typically issued through a Protection and Indemnity Club ("P&I Club") of which they are a member.[15] As long as there is a ceiling on coverage, these methods of coverage are relatively available. There is of course one condition: that they be fully collateralized. The higher the covered amount, the more

[15] The Ivancie Report stated that only one passenger vessel operator used a bank guaranty arrangement and one used an escrow arrangement, while nine used surety bonds and guaranties issued by insurance companies and thirty relied on P&I Club guaranties. Ivancie Report at 44-45.

difficult the instrument is to obtain and the greater the burden on the vessel operator.

With respect to surety bonds, the Commission has observed:

> [T]he evidence of financial responsibility which carriers have posted in most cases must be fully collateralized by cash or equivalents as a requirement of underwriters providing such evidence. The underwriters generally will not issue a bond or other evidence unless it is supported by cash deposits or equivalents.

55 Fed. Reg. 34564, 34567 (Aug. 23, 1990)(emphasis added). The experience of AMCV fully confirms this observation. Attached to these comments as Exhibit A is correspondence from AMCV's insurance brokerage firm, Rollins Hudig Hall, explaining the full-collateralization requirement. The Commission has also obtained comments in this Docket from The Surety Association of America pointing out that adoption of the proposed rules will mean that "surety bonds may not be a viable solution for vessel operators that need to replace self-insurance, or provide increased limits of security."[16]

The experience with guaranties is nearly identical. Although P&I Clubs are self-insurance-type pools operated on a non-profit basis, they still require the cruise operator to fully collateralize the guaranty with an unconditional letter of credit or other collateral to the P&I Club in order to reimburse the P&I Club for claims filed against the guaranty. 55 Fed. Reg. 34564,

---

[16] See Letter from William L. Kelly, Assistant Director - Surety of The Surety Association of America, to the Commission of April 14, 1994. This Association represents more than 650 surety companies that collectively provide approximately 95% of the surety bonds written in the United States.

34567 (Aug. 23, 1990); Ivancie Report at 16-17. More significantly, the P&I Clubs have commented to the Commission that if the ceiling were removed, they would simply be unable to continue providing guaranties in many cases. 55 Fed. Reg. 34564, 34567 (Aug. 23, 1990).

Although the Commission has suggested that guarantors and surety companies undertake an "analysis and endorsement of a PVO's [passenger vessel operator's] future financial and operational risk-worthiness," this conclusion is misleading, because where cash collateral is required, little independent assessment is necessary. 57 Fed. Reg. 62479, 62480 (Dec. 31, 1992). The collateralization practices of guarantors and surety companies combined with the proposed elimination of the coverage ceiling means that it will no longer be enough for vessel operators to be financially responsible, instead they must be in a position to provide an unconditional guaranty of total UPR.

Chairman Hathaway recognized the potentially burdensome and unreasonable levels of coverage that could be required with dollar-for-dollar coverage when he testified before the House Merchant Marine & Fisheries Committee's Merchant Marine Subcommittee last year:

> [unlimited coverage] could run up to about $100 million . ..to require coverage of that amount I think would be far beyond what Congress actually intended.

FMC and MARAD Authorizations, FY 1994 Hearings, 103d Cong., 1st Sess. 7 (1993).

The burdens of requiring cash or cash equivalents to be set aside in amounts as large as this are obvious. Few airlines,

hotels, resorts or other companies in the travel industry could function with this kind of drain on working capital. It is clear that this would limit the ability to make the kinds of capital investments required of the capital-intensive maritime industry. Construction costs for modern cruise ships can run $150,000 per berth or more,[17] and with 2000 or more berths on some of the larger vessels, the capital requirements are substantial.

AMCV is no exception. The AMERICAN QUEEN, which is currently under construction in Louisiana, will cost $65 million, or more than $155,000 for each of the 420 berths. AMCV made its capital investment decisions with respect to this vessel several years ago and planned accordingly. The Company obtained a $65 million credit facility and began the project. This was done at a time when the Company counted on obtaining, and eventually qualified for, self-insurance. Then, with the acquisition of the AHC vessels and the assumption of the previous owners' Performance Certificate obligations of $15 million, the Company planned an additional $60 million in capital improvements, once again secure in the knowledge that it was eligible under the Commission's regulations to qualify for self-insurance. However, under the new proposal, and without accounting for the addition of the new vessel, the Company would have to set aside over $46 million in cash or cash equivalents, representing nearly 40% of its capital expansion plans. Adoption of the proposed rule will

---

[17] See Edwin McDowell, Cruise Lines Betting That Bigger Will Be Better, N.Y. Times, June 15, 1994, at D1-2.

force AMCV to seriously reconsider those plans. Put another way, for AMCV, the new rules are the equivalent of pavins cash for the construction of a new 300 passenger vessel (at $150,000 per berth), but without ever being able to use the vessel![18] Clearly the financial burden on all passenger vessel operators will be substantial. Moreover it will serve as a significant disincentive for investment in the merchant marine.

2. Insurance is not commercially available

Given the nearly impeccable record of the cruise industry in performing its transportation obligations, one would think that the risk of nonperformance might be a readily-insurable risk and that most cruise ship companies would take advantage of the insurance option under the Commission's regulations. The fact of the matter is, however, that not one single company has selected the insurance option. Ivancie Report at 44. If the experience of AMCV is any guide, the reason for this is that such insurance is simply unavailable. It is not a question of prohibitively high premiums, it is a question of availability. In its market research, AMCV has found no insurance carrier offering commercial insurance to cover this risk.

3. The escrow account option is unworkable

Like the insurance option, the escrow option in the Commission's regulations is, for all practical purposes, not a feasible option for the larger cruise operator. The reason is that the escrow system is more costly than other alternatives and

---

[18] See discussion infra, p. 50.

so cumbersome as to be unworkable. This is particularly true if the ceiling on coverage were to be removed. As explained in the Ivancie Report:

> If a cruise company is compelled to deposit all passenger payments in an escrow account, all of this portion of the company's working capital would be unavailable before sailing. The company would then be forced to borrow an amount equal to the escrowed amount to replenish its working capital. For P&O [Pacific & Orient, the parent of Princess Cruises] this would result in borrowings of $100-150 million., If we assume that the escrowed funds earned 735% and the new borrowings cost 10%, P&O would incur an unnecessary interest expense of over $3 million annually. . . . These costs will ultimately be borne by the cruise passenger.

Id. at 19, quoting Comments of Princess Cruises, Transcript, Los Angeles Hearing, Jan. 16, 1991, Exhibit I at 4-5.

The difficulties with the escrow alternative are evidenced by the fact that no large or mid-sized vessel operators use this option. At the time of the Commission's investigation, only one company, Delta Queen, had an escrow account and it now qualifies as a self-insurer. Ivancie Report at 44.

So cumbersome is the escrow alternative that Delta Queen wound up effectively providing full cash collateral to its escrow agent rather than trying to track each individual ticket transaction. The methods for calculating required UPR and for tracking deposits illustrate some of the problems. For example, a primary depository bank may not handle individual refund disbursements to travel agents for passenger cancellations. Many banks will only perform deposit/disbursement and fund management functions on a weekly basis. This results in significant additional costs due to inaccurate calculation of actual UPR. It

is also difficult to track escrow credit card purchases. It is even more difficult, if not impossible, for vessel operators to determine the portion of a deposit that is for the voyage, requiring a deposit into escrow, and the portion that is for other services such as air, hotel, car rental and cancellation insurance which need not be escrowed, and in fact are needed to pay in advance to other vendors. Because this apportionment is simply not feasible, the vessel operator ends up matching the passenger's entire payment even though only a portion of it covers the cruise.

The escrow alternative imposes the same kinds of limitations on working capital as the guaranty and surety bond options, but with even more problems because of the difficulties in administering the escrow account. These practical difficulties, together with the serious problem of securing additional financing to make up for the loss of working capital to the escrow account, make the escrow alternative difficult under the current regulatory regime. Thus, with the proposed elimination of the ceiling, the escrow alternative offers no advantage over securing a bond or guaranty with cash collateral, and with its cumbersome administration, it is unrealistic as a practical option.

II. THE COMMISSION'S JUSTIFICATION FOR REVERSING ITS CURRENT REGULATIONS IS INADEQUATE, PARTICULARLY WHERE NO ONE HAS EVER BEEN WITHOUT COVERAGE IN THE EVENT OF NONPERFORMANCE

As discussed above, the Commission has developed comprehensive regulations and a consistent interpretation of P.L. 89-777 through numerous rulemakings, hearings, an investigation and Congressional action, all of which have resolved the fundamental issues in this rulemaking. In the intervening months there has been great reliance on this record by cruise operators such as AMCV who have made significant acquisitions and other investment decisions secure in the knowledge that the basic interpretation of the statute had been resolved."

Now, 'this proposed rulemaking, combined with the particular factual circumstances present in the industry, will completely alter that well-settled regulatory framework. Under these circumstances, the agency has a particular responsibility and obligation to demonstrate why such a change is warranted. Yet the statement accompanying the proposed rule addressed the need for change in only a few short sentences. 59 Fed. Reg. 15149, 15150 (Mar. 31, 1994). The cruise industry and the public deserve more of an explanation before the Commission's well-established interpretations are summarily reversed. In the words of the Supreme Court:

> An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis . . .

---

[19] See supra Section I.D.l, p. 20.

See Motor Vehicle Mfrs. Ass'n v. State Farm, 463 U.S. 29, 57, 103 S.Ct. 2856, 2874, 77 L.Ed. 2d (1983); see also id. 463 U.S at 42, 103 S.Ct at 2866 ("an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change"). In Atchison, Topeka & Santa Fe Rv. Co. v. Wichita Board of Trade, the Court explained that an agency has a "duty to explain its departure from prior norms," and that "whatever the ground for the departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate." Id., 412 U.S. 805, 808, 93 S.Ct. 2375, 37 L.Ed.2d 350 (1973), cited by Motor Vehicle Mfrs. at 103 S.Ct. 2866: see also Congresso de Uniones Inudstriales de Puerto Rico v. N.L.R.B., 966 F.2d 36, 39 (1st Cir. 1992), where, in the context of an NLRB decision in which the Board "departed from precedent," Judge Breyer explained that an agency "cannot depart significantly from prior precedent without explicitly recognizing that it is doing so and explaining why." (Emphasis in original.)

Under the standards set forth by the Court, the Commission "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" Motor Vehicle Mfrs., 103 S.Ct. at 2866, quoting Burlington Truck Lines, Inc. v. U.S., 37 U.S. 156, 83 S.Ct, 239, 245-246, 9 L.Ed.2d 207 (1962).

Here, the Commission has examined the relevant data and articulated explanations for its actions over the course of the

past four years by ordering the Ivancie Report and with the various rulemakings considered in Dockets Nos. 90-1, 91-32, 92-19 and 92-50. The implementation of various recommendations in the Ivancie Report was the result of a well-thought out and thoroughly conceived plan of regulatory action. On the other hand, the Commission's latest proposals represent a revocation of two fundamental aspects of that plan -- the ceiling and the self-insurance option -- with no comparable review or analysis.[20]

Under the standards applied by the Supreme Court, the Commission has failed to meet its burden of undertaking a thorough investigation before completely reversing a long-settled policy. The reasons offered to support this regulatory reversal simply do not justify ignoring the significant record developed by the Commission on these issues.

A. There is no evidence of a problem

Before addressing the specific justifications offered by the Commission for the proposed changes, the analysis must begin with the fundamental question of whether the travelling public targeted for protection by P.L. 89-777 has, in fact, been protected. Are there passengers who have been unable to recover monies when a cruise was not performed? The simple and unambiguous answer after 28 years is that there have been none. 57 Fed. Reg. 19097, 19098 n.16 (May 4, 1992). This alone is

---

[20] As the Court in Motor Vehicle Mfrs. stated: "revocation constitutes a complete reversal of the agency's former views as to the proper course." Id.

compelling evidence that the system is working. Commissioner Ivancie put it best in his Report to the Commission:

> In the twenty-five years since enactment of P.L. 89-777, there have been relatively few passenger cruise operator bankruptcies . . . and in each case the existing evidence of financial responsibility was more than adequate to cover potential passenger claims.

Ivancie Report at 15 (emphasis added).

B. The Commission has not provided the required justification for reversing its current rules

The Commission's proposed rule reverses current regulations by eliminating the ceiling on coverage and the self-insurance option. In support of this reversal in position, the Commission cites three developments since the last docketed proceedings on these issues in 1992. These are:

> (1) the fact that some passenger vessel operator's UPR greatly exceeds the current $15 million ceiling and that in the aggregate there is about $300 million in coverage presently on file for an estimated $1 billion in UPR, leaving some $700 million in UPR without Section 3 coverage;
>
> (2) the involuntary bankruptcy of American Hawaii Cruises (AHC); and
>
> (3) with respect to self-insured operators, a concern that sufficient funds might not be available to indemnify passengers because assets otherwise available to passengers might be subject to prior liens.

59 Fed. Reg. 15149, 15150 (Mar. 31, 1994).

For the reasons set out below, these explanations fail to provide the reasoned analysis required under the Supreme Court's holding in Motor Vehicle Mfrs., discussed supra, p. 27-28.

1. **The "gap" in UPR coverage** presents no increase in risk to the travelling public sufficient to warrant the proposed change

a. The **"gap"** has decreased since the Commission last examined this issue

The "gap" in coverage to which the Commission cites as a basis for deleting the ceiling is no different from the circumstances present at the time of the Ivancie Report. In fact, the gap appears to have narrowed in the intervening three years. The Ivancie Report cites an estimated UPR exceeding $1 billion and coverage filed at the Commission of approximately $250 million creating a "theoretical exposure of $750 million." Ivancie Report at 37. As noted, the current gap has been reduced to $700 million. 59 Fed. Reg. 15149, 15150 (Mar. 31, 1994).

b. There is no correlation between a **"risk"** of loss to the travelling public **and excess UPR above the ceiling**

The Commission perceives an increased exposure to risk of the travelling public's deposits as a result of an overall increase in prepaid fares (presumably due to the success of passenger vessel operators and the traveling public's satisfaction with the cruises offered by those operators)[21] and reports an approximately $700 million difference between UPR coverage and the estimated industry UPR. While there may be a "theoretical gap" in UPR coverage, the suggestion that it

---

[21] **This is not a new phenomenon. In the Ivancie Report, the Commissioner explained that the average growth rate in cruise passengers was 10.3% from 1981 to 1991 and the industry spends over $400 million in mass marketing per year. Ivancie Report at 3.**

reflects "the increased exposure to risk of the travelling public's deposits and prepaid fares" is without support. First, as noted above, there has been no increase, but rather a decrease in the gap since the Commission last examined the issue.

More significantly, however, the risk of loss of UPR is simply not a function of the amount of the gap above the ceiling. While the gap may indicate potential exposure, the actual risk of exposure, i.e., the loss of any UPR, is a function of the financial condition of the vessel operator. With the increased interest in cruises leading to an increase in UPR, the risk of loss of any UPR under this scenario is decreasing rather than increasing. When Commissioner Ivancie recommended that the Commission retain the $15 million UPR ceiling, he found an increase to be "not justified," despite the fact that an even greater UPR coverage gap existed then than now. The lack of justification for eliminating the ceiling was explained as follows:

> The amount of unearned passenger revenue in the passenger cruise industry exceeds the $1 billion figure. The existing coverage filed with the Commission is for a little over $250 million. Therefore, there is a theoretical exposure of over $750 million.
>
> However, the twenty-five years of industry and Commission experience, since enactment of P.L. 89-777, shows that there is little cause for alarm.
>
> The industry has an almost impeccable record. Missed sailings are now a rare occurrence. Even when there are cancellations, cruise line operators have historically refunded or made alternative arrangements that have been acceptable to the affected passengers.
>
> The few times when there has been any need to utilize the security instrument on file with the Commission, the

> available funds have been more than sufficient to cover the claims.

Ivancie Report at 37 (emphasis added).

The remarkable growth in the industry since enactment of the statute and the trend toward larger ships represents substantial additional collateral value which itself diminishes the significance of the theoretical gap.

As far as any disputes or problems concerning passenger vessel operator nonperformance, Commissioner Ivancie's statement on the industry speaks for itself:

> The operators are very aware that a reputation is a very valuable asset, and they seem to be willing to go beyond what is legally required to make sure that their passengers are satisfied.

Ivancie Report at 6.

Delta Queen's experience with the midwest flooding last year provides another example. With a number of cruises cancelled due to the extreme and well publicized floods, Delta Queen took numerous steps to accommodate its passengers and their expectations. The Company re-routed some cruises and offered discounts and special "two-for-one" fares on subsequent cruises. The Company also guarantied a 100% refund if a passenger was unhappy. At the end of the season there was not a single unsatisfied claim for nonperformance made against the Company.

There is simply no evidence of any increased exposure to risk of the travelling public that would warrant the proposed changes to the rules. In fact, the evidence points to the opposite conclusion, that is, a decreased exposure as a result of

the Commission's current rules. And if anything, the over-collateralization inherent in the proposed elimination of both the coverage ceiling and the self-insurance option will only work to increase the risk of business failures by the enormous drain it will place on working capital. While such a consequence will necessarily inure to the benefit of the larger operators by reducing their competition, it will also result in higher fares and reduced service, ultimately hurting the travelling public.

c. Travel industry and consumer practices provide protection of passenger deposits

The Commission's conclusion that an increase in the total industry UPR above the "covered" UPR equates to an increased risk to the travelling public ignores the fact that there are other protections available beyond the financial responsibility requirements of P.L. 89-777. In the case of AMCV and most other vessel operators, the amount of prepaid deposits is only a fraction of the total cost of the transportation (according to the Ivancie Report at 6, industry practice is to collect a $100 to $250 deposit about three months before sailing). The large remaining balance is paid usually within 30 to 60 days before a scheduled voyage. Id. at 7. Therefore, until four to eight weeks prior to the cruise, a passenger is at risk for only a small portion of the full fare.

When passengers do finally pay the remaining balance of the fares, they typically complete the transaction with one of the more than 30,000 retail travel agents through which some 95 percent of all cruise packages are sold. See Ivancie Report at

3. These travel professionals maintain close contact with the vessel operators and are constantly collecting detailed information on the cruise lines calling at U.S. ports. These travel agents function essentially as watchdogs for their customers and cannot risk their professional reputations, and maybe more importantly, multiple law suits by their customers, by booking them aboard ships operated by financially undercapitalized, unstable or undependable vessel operators.

Travel agents also offer their customers additional insurance coverage on an individual basis which covers a wide variety of travel risks including the potential nonperformance of the cruise ship operator. See TravelSafe brochure, a copy of which is attached hereto as Exhibit B. By its express terms, this policy covers the bankruptcy of the cruise operator and other causes of nonperformance. For those passengers or travel agents who are uncomfortable with the financial responsibility of a particular operator based either on the "gap" in coverage on file with the Commission, or for other reasons, this additional insurance is commercially available for their protection.

In addition to this voluntary insurance, passengers who pay their fare balances with credit cards automatically benefit from the statutory protections under the Truth in Lending Act ("TILA").[22] Under the applicable sections of TILA, a cruise

[22] TILA, Section 308, Pub. L. 93-495, 88 Stat. 1515, codified at 15 U.S.C. § 1666i, and 12 C.F.R. §§ 226.12(c), 226.13. Under TILA, a consumer may assert a defense to payment against a card issuer of payment for transactions of more than (continued...)

passenger may dispute a charge which appears on his or her credit card for transportation that was not provided by the vessel operator. TILA automatically protects the passenger from having to pay the bill or incur interest charges as long as written notice is provided to the card issuer within 60 days of receipt of the statement. The burden of payment for nonperformance then shifts back to the card issuer, who, in turn, will charge the amount in dispute back to the vessel operator. Even greater protections are available to passengers who use gold, platinum or other "premium" cards available in the market.

To illustrate the consumer protection afforded under TILA, if a prospective cruise passenger pays the balance of a fare with a credit card approximately four to six weeks prior to the scheduled departure, a bill would be generated by the card issuer and would likely be received within one month thereafter (about the time of the voyage), which then would not be due for about another month. So long as the passenger did not pay the credit card bill prior to the voyage, in most cases of vessel operator nonperformance, the passenger would simply notify the card issuer

---

[22](. ..continued)
$50 (or a right to charge back purchases to the credit card issuer) if the consumer a) makes a good faith attempt to obtain a satisfactory resolution of a problem, b) objects in writing to the charge within 60 days of receiving the issuer's statement listing the charge, and c) the initial transaction took place within 100 miles of, or the same state as, the mailing address of the consumer. Id. TILA does limit recovery, however, to amounts not already paid to the card issuer. 15 U.S.C. §§ 1666i(a),(b). See, e.g., In re Standard Financial Management Corp., 94 B.R. 231, 237 (Bankr. D. Mass. 1988).

and no payment would be required. The card issuer would then charge back the amount to the carrier.

Credit card companies, such as VISA for example, are well aware of their obligations to card holders under TILA. Because of the risk to the card issuer, these companies undertake an analysis of the merchant (here, the vessel operator) and negotiate their fee arrangement with the merchant based upon the risk of exposure under TILA for nonperformance.

2. The travelling public's fares and deposits were not at risk in the AGL/AHC bankruptcy

The second of the "developments" the Commission has cited as a basis for its reconsideration of its financial responsibility requirements is the bankruptcy of the previous owners of the ARC vessels, American Global Lines, Inc. and American Hawaii Cruises, Inc. ("AGL/AHC"). No one disputes the fact that these vessels operated "without disruption in their transition to new ownership" and that there were no passenger claims for nonperformance. 59 Fed. Reg. 15149. The Commission's concern stems from the fact that even though AGL/AHC met the maximum coverage of $15 million (and was entitled under the sliding scale to a lower level), had there been a total disruption of the vessels operations and had no passenger been otherwise compensated, there would have been a potential $20 million shortfall between the $15 million ceiling and the estimated $35 million UPR. Id.

The Commission's speculative "worst-case" hypothetical ignores the reality of the circumstances involving AGL/AHC and

the actual response of the industry and the market. First, as AMCV's acquisition of the AGL/AHC vessels bears out, there was in fact no risk to passengers from the bankruptcy. The economic and commercial realities of the cruise industry (with its high fixed-costs -- see Ivancie Report at 7) militate in favor of a bankrupt vessel operator's creditors and/or the receiver or trustee continuing to operate the ships during reorganization or until a purchaser is found. Specifically, as long as there are future receivables in the form of unpaid balances on fares (and as explained earlier, there always are), it will be to the economic advantage of the trustee and the creditors to honor the deposits, to collect the remaining balances, and to keep the vessels operating or to provide an alternative cruise if the originally-scheduled vessel cannot be used. In other words, because a bankrupt company's future accounts receivable will be one its most valuable assets, all the incentives run in favor of providing the cruise or an alternative cruise to earn the balance of the fares. Therefore, passenger deposits are not at risk to the extent suggested by the Commission's treatment of this incident.

Second, in the particular case of AGL/AHC, the "involuntary bankruptcy" characterization is misleading. In actuality, and as the Commission was informed at the time, this was a very carefully planned legal maneuver as part of a business transaction that was structured to facilitate the transfer of the two AGL/AHC vessels to the Company while keeping them in full

operation. In order to resolve certain ownership and other legal issues, AGL/AHC's secured lenders filed for involuntary bankruptcy protection of the owning company. As part of the planned transition, these lenders ended up with an interest in the new owning company. The transfer proceeded with the full acceptance of all of the trade creditors, and with assurances given to the bankruptcy court that all trade creditors would be paid, as, in fact, they were.

Further, central to this transaction was the intention of all parties to keep the vessels running with no disruption to the travelling public. Every effort was made to keep creditors, regulatory agencies and the travelling public apprised of the transaction. The Commission was informed of the transaction by the principals from the beginning through the actual transfer of title to the vessels.[23] In fact, as near as AMCV is aware, there was little recognition and no consequence of the "involuntary bankruptcy" to the travelling public. There were certainly no claims for nonperformance, let alone any failure to pay them. Moreover, the Company believes that at all times the

---

[23] The principals first approached the Commission in May of 1993. Then on June 2, 1993, an application for a Performance Certificate was filed, 60 days in advance of the anticipated acquisition date, as required by Commission regulations. The Commission wrote back to the parties the following week to confirm the procedures. Throughout the month of July the parties worked closely with Commission staff to structure the transition. On August 3, 1993, the Commission approved the transfer of the underlying evidence of financial responsibility with the release of the existing surety bond and provision of a substitute guaranty, made retroactive some 12 years to 1981 in order to cover all possible claims.

potential value of the operators always exceeded UPR so that passenger's funds were never at risk.

Thus, contrary to the Commission's assertion that this business reorganization illustrates a need for removing the current ceiling, the outcome supports the conclusion that the current system works and that industry and market forces will respond in practice to the benefit of the travelling public by working to keep the vessels in operation. This transaction was little more than another example of one of Mr. Ivancie's observations of "large operators [buying] out smaller ones, thus making the industry somewhat more financially stable." Ivancie Report at 5.

3. There has been no change in circumstances since the Commission's earlier rulemakings to warrant the termination of the self-insurance option

In support of its proposed rescission of its earlier rulemakings with respect to the self-insurance option, the Commission points to a recently revealed "vulnerability." Specifically, the concern is the potential that mortgagors, crew members or other maritime lienors would exercise their statutory lien rights (priorities that they have enjoyed at least since enactment of the Ship Mortgage Act in 1920), which would put them ahead of unsecured creditors such as passengers who may have claims for nonperformance. This apparently was not of concern in the Commission's fact finding investigation, although Mr. Ivancie clearly had received testimony on the subject of maritime lien rights. Ivancie Report at 29. In fact, the record reveals that

both Mr. Ivancie and the Commission itself seriously considered liberalizing the self-insurance requirements in a manner that would have put these very assets much further out of reach by permitting the self-insurer to use assets located outside of the United States in qualifying for self-insurance. See id.; 56 Fed. Reg. 40586 (Aug. 15, 1991). The Commission chose, however, to limit the net worth requirements to consideration of U.S.-based assets only. 57 Fed. Reg. 19097, 19098 (May 4, 1992). Now, in proposing the elimination of the self-insurance option, the Commission apparently has concluded that these assets are of no value in terms of establishing financial responsibility, simply because there may exist maritime liens superior to potential passenger claims.

Even assuming that there had been some change in circumstances to support the elimination of the self-insurance option, the Commission is obligated to at least provide a reasoned analysis for the reversal of the current rule.[24] The simple fact that there may be creditors with a higher lien priority than passengers is not sufficient. The Commission offers no analysis or explanation why the carefully crafted current rule providing for net worth of 110% of UPR, comprised of U.S.-based assets and subject to various reporting requirements, is no longer adequate. This is particularly true when taking into account the fact that the net worth calculation already accounts for the superior maritime liens with which the

---

[24] See Motor Vehicle Mfrs., discussed supra, p. 27-28.

Commission is concerned. Those debts which give rise to superior maritime liens -- the preferred mortgage, crew wage claims, maritime lien claims, etc. -- are all liabilities that are expressly recognized on a company's balance sheet and deducted before calculating net worth. Moreover, Delta Queen, the only commercial operator to qualify for self-insurance, was approved with a net worth of over 200% of UPR, well in excess of the Commission's regulatory requirement of 110%.[25] The Commission has provided no suggestion that somehow this approval was inappropriate or that developments with AMCV require a different result for Delta Queen, let alone a reason for eliminating the option altogether.

The Commission's explanation also ignores other factors relevant to the hypothetical inability of passengers to recover monies in the face of competing claims from lienors with a higher priority. As discussed above, many cruise passengers will be able to avoid losses if their tickets were purchased by credit card (as most are) or if they obtained optional commercially available insurance for individual travellers. These factors combined should mitigate the Commission's concern over the potential impact of superior maritime lien priorities.

The entire thrust of the Commission's investigations and rulemakings over the past four years with respect to the self-insurance option has been to liberalize its requirements to make the option more available. Until now, there has never been any

---

[25] See letter from J. Polking, supra note 7, p. 8.

suggestion that the option be eliminated. One reason it should be retained is that, unique among the five'types of evidence to be used to establish financial responsibility, the self-insurance option is the closest to what Congress originally intended in adopting Section 3 of P.L. 89-777. Moreover, it reflects the normal governmental role in all other travel businesses of which AMCV is aware.

As discussed above, Congress originally envisioned that the Commission would first obtain the necessary information to determine whether an operator was financially responsible. If that were not forthcoming, or in lieu of that information, the Commission was given the authority to require a bond or other security. With the proposed elimination of the self-insurance option, the Commission will no longer permit such evidence and a vessel operator will no longer be able simply to establish that it is financially responsible, even with substantial assets in the United States; it will now be forced into the role of an unconditional guarantor.

c. The Commission should analyze the costs and benefits of the proposed rule

An assessment of the costs and benefits of any rulemaking is a fundamental element of the federal regulatory process. Executive Order 12866, which establishes the key principles of federal rulemaking, emphasizes the importance of evaluating the advantages and disadvantages of a rulemaking in advance:

> In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating.

> Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider.

Exec. Order No. 12866, 58 Fed. Reg. 51735 (1993).

The Executive Order specifically requires independent agencies, including the Commission,[26] to prepare a Regulatory Plan of its key regulatory actions and forward that Regulatory Plan to the Office of Information and Regulatory Affairs ("OIRA") of the Office of Management and Budget ("OMB") by June 1 of each year. That Regulatory Plan requires a summary of "each planned significant regulatory action, including to the extent possible, alternatives to be considered and preliminary estimates of the anticipated costs and benefits." 58 Fed. Reg. 51735, 51738 (1993). There is no evidence that the Commission has conducted this cost/benefit analysis with this proposed rule.

In fact, AMCV is aware of only one brief cost/benefit statement in the record of these various rulemakings. In his report, Commissioner Ivancie offered this critique of the costs

---

[26] Independent regulatory agencies like the Commission are exempt from portions of Executive Order 12866, as they were under the predecessor order, Executive Order 12291. The Commission nonetheless chose to apply the analytical requirements of Executive Order 12291 in determining that each of its earlier rulemakings in this area were not "major rules" requiring a cost/benefit analysis. Apparently no similar determination could be made here since this proposal will likely be "significant," as it will have an annual effect on the economy of $100 million or more, will increase the costs or prices for consumers and the cruise industry, will have a significant adverse impact on competition, employment, investment, productivity and, as discussed <u>infra</u>, p. 52, will disadvantage U.S.-based enterprises in their ability to compete with foreign ones.

and benefits of a dollar-for-dollar insurance or bonding requirement: "Costs would be raised and the individual passenger's protection would not necessarily be increased." Ivancie Report at 15.

Commissioner Ivancie's assessment continues to be correct. There is no evidence of any material changes in the cruise industry since his Report was issued. As is evidenced more fully below, the costs of the proposed rule are great (and hit American companies the hardest), whereas the benefits are minimal. An insurance or bonding requirement has direct implications on a company's cash flow and working capital base. Monies that could be used for economically productive purposes, including expansion and fleet modernization, are frozen in an economically unproductive status.

As noted earlier, the effect on AMCV is illustrative of the enormous cost of this proposal. The net worth of the Company on December 31, 1993 was $84.7 million. The bonding requirements of this proposed rulemaking, depending on the alternative, would freeze between $43.2 and $46.3 million of working capital annually. This onerous requirement -- that the Company put aside capital representing in excess of 50% of its net worth to meet bonding standards -- would be imposed even though AMCV's net worth is 184% of its highest level of unearned passenger revenue in the past two years ($45.9 million).

Costs of this magnitude should be imposed only where the benefits are of comparable magnitude. In this case, however,

there are few identifiable benefits at all. The current regulatory regime has served the statutory purpose of weeding out weak entrants into the market. And as noted earlier, no ticketed passenger on a vessel subject to the Performance Certificate requirement has ever been unable to recover ticket monies lost as a result of a cruise line's failure to perform. There is simply no evidence of any problem in this area since the statute was first enacted. While it is difficult to quarrel with the Commission's argument that a business failure at some future time is possible, there is little evidence that it is likely. With no indication of a problem, it is difficult to see how the "benefit" of the proposed rule justifies the enormous cost.

Ironically, the principal "benefit" of this rule will inure not to consumers but to the largest, richest foreign cruise lines. A substantial additional capital requirement helps discourage potential new entrants to the market, protecting the market for those with the financial capacity to accept a significant loss of working capital.

In short, the Commission has failed to conduct a cost/benefit analysis of this significant rulemaking. Were it to conduct such an analysis, it would be apparent that the costs of this proposed rule far exceed its speculative benefits.

III. ADOPTION OF THE PROPOSED RULE WOULD PLACE A SUBSTANTIAL BURDEN ON THE CRUISE INDUSTRY WHILE SIMULTANEOUSLY INCREASING THE RISE TO THE TRAVELLING PUBLIC

As noted above, the legislative intent of P.L. 89-777 was to protect the vessel-going public while not over-burdening

passenger vessel operators. This has also been the Commission's stated policy in carrying out its statutory mandate. See Ivancie Report at 1. The proposals being considered in this Docket, however, are antithetical to the balance struck by Congress in the statute and, until now, maintained by the Commission.

A. Dollar-for-dollar coverage is excessive and will have a severely adverse impact on affected cruise operators

The current practice of requiring as much as 110% coverage for fare deposits up to the $15 million ceiling is already considerably more than is required in other industries and will be truly excessive should the ceiling be removed. For example, the airline industry, which holds tremendous sums of advance deposits and prepaid fares (particularly if frequent flyer obligations are included), is not subject to dollar-for-dollar coverage. Instead, the process used by the Department of Transportation ("DOT") for the airline industry is similar to what Congress originally envisioned for the cruise industry. DOT conducts fitness determinations of licensed air carriers that apply for a certificate of authority to conduct scheduled service.[27] These fitness determinations involve a number of considerations, including, among other things, 1) managerial competence; 2) favorable compliance disposition; and 3) a reasonable financial proposal, which includes a showing that the applicant has the financial capacity to carry out the proposed

---

[27] See Federal Aviation Act, § 401(d)(l), 49 App. U.S.C. § 1371(d)(These fitness determinations were formerly made by the Civil Aeronautics Board or "CAB").

service. If, after review, DOT determines that these factors warrant additional UPR protection against cancellation for passengers and shippers, it may impose a performance bond requirement, in such an amount as it deems necessary on a case-by-case basis.[28]

DOT has imposed performance bonds in only a handful of situations where there was a weak financial proposal or a poor record of regulatory compliance.[29] In none of these cases however, did DOT (or the CAB before it), require full coverage protection of UPR.[30]

An example of a more rigid bonding scheme, but one where dollar-for-dollar coverage of UPR is also not required, is the regulation of public air charter operators. Public air charter

---

[28] Id., § 401(q)(2), 49 App. U.S.C. § 1371(q)(2).

[29] See, e.g., Global International Airways Corporation Fitness Proceeding, Docket No. 38955 (Order No. 81-g-105, Sept. 16, 1981), Aviation Law Reporter Transfer Binder 1979-89, ¶22,347, where an administrative law judge's recommendation to impose a bonding requirement because the carrier's current assets were only $700,000 in contrast to its current liabilities of $1,900,000 was overruled because the CAB concluded that the carrier's "current financial situation is not so perilous when viewed against other new entrants generally as to necessitate the unusual step of imposing a bonding requirement." (Emphasis added.)

[30] See e.g., Application of Renown Aviation, Inc., Docket No. 48796, Orders 93-10-33 (Oct. 20, 1993), 93-10-13 (Sept. 8 1993), 93-8-30 (August 20, 1993)($100,000 and $200,000 surety bonds required to protect passenger and shipper UPR, respectively); Lone Star Airways, Certificate, Order 82-9-10, 97 C.A.B. 421 (Sept. 2, 1982) and Lone Star Airways Fitness Proceeding, Order 82-2-27, 94 C.A.B. 5 (Dec. 11, 1981)($1 million bond required); Aeroamerica. Unused Authority, 91 C.A.B. 872 (Aug. 28, 1981) ($100,000 bonding requirement imposed on carrier in Chapter XI reorganization).

operators are subject to a mandatory bonding requirement of only $10,000 per round-trip up to a maximum of $200,000 per year, regardless of how many trips are scheduled. 14 C.F.R. § 380.34(b). Public air charter operators include any U.S. citizen who engages in the formation of groups for transportation on a one-way or round-trip charter and sponsors and arranges such charters.

Other industries that have bonding requirements are universally lower than the $15 million ceiling, let alone the unlimited coverage under consideration. See, e.g., government chartered transportation services ($10,000), 4 C.F.R. Part 56; bonding requirements for alcoholic beverage distillers ($150,000 to $1.3 million), 27 C.F.R. Parts 19, 22, 24, 25; interstate motor carriers ($500,000), carriage of hazardous wastes or explosives ($5 million), 49 C.F.R. Part 387; and interstate passenger common carriers regulated by the ICC ($5 million), 49 C.F.R. Part 1043.

The current proposal for virtually unlimited dollar-for-dollar coverage is not only unrealistic but it is also prejudicial in relative terms when compared to cruise lines' direct competitors for the consumer's vacation dollar. These competitors, including hotels, resorts and other travel/vacation alternatives have no similar requirements. In absolute terms, the current proposal is many times the security required to be supplied under numerous other statutory regimes, including many where the potential liability is far greater.

The only way that most cruise companies will be able to meet the dramatically increased requirements will be to divert funds from other purposes, including general working capital, to be devoted to unproductive collateral to meet the nonperformance requirements. This will have an adverse impact on all aspects of their operations with little or no benefit beyond that which is already achieved by the current $15 million coverage ceiling.

The situation with the AMCV companies is illustrative. The highest level of UPR within the last two years for the Company's combined operations was $45,990,000. As of December 31, 1993, AMCV had a net worth of $84,786,000, or 184% of its highest UPR and well in excess of the regulatory minimum of 110% required for self-insurance.[31] Because this UPR exceeds $25 million, AMCV would be eligible to take advantage of the sliding scale contained in the new proposal. Even so, the required coverage for the Company would more than triple under the Commission's proposal from $15 million to a whopping $46,391,000. This of course is more than the entire UPR and a significant strain on AMCV.[32] There are very few companies that are in a position to set aside 65% in cash or cash equivalents without an adverse impact on their ability to do business. AMCV is no exception. The current proposal mandates a needless and potentially devastating over-collateralization

---

[31] Delta Queen by itself already qualifies for self-insurance. See supra note 7, p. 8.

[32] Even under the alternative sliding scale proposed by the Commission, the required coverage would be $43,242,500.

requirement that is far in excess of other similar regulatory regimes in other industries. If adopted, it will have an adverse affect on AMCV's current operations and could possibly force AHC to cancel or postpone its planned $30 million refurbishment of its second vessel and could severely constrain its operations.

B. The proposed rule will force operators to shift to nearby foreign ports of departure to escape the onerous requirements and thereby eliminate protection for some portion of the North American travelling public

With the requirements of dollar-for-dollar coverage as burdensome as they will be if the proposed rules are adopted, prudent vessel operators will be forced to explore ways to avoid the excessive over-collateralization, particularly if they want to remain competitive with other travel sectors. Cruise vacations generally compete for customers' dollars with a variety of other vacation alternatives, including recreational resorts, theme park attractions, tour packages and air travel. Many of these require advance deposits or full payment up front in amounts similar to those in the cruise industry, yet they are not subject to any coverage requirements, let alone the dollar-for-dollar coverage facing the cruise industry.

One advantage cruise operators have over land resorts is the ability to move to alternative locations. Faced with the requirements under consideration now, vessel operators will be exploring every available option. A logical alternative will be to shift ports of embarkation outside the United States to nearby foreign ports like Bermuda, the Bahamas, or any of several Caribbean Islands.

With the widespread use and convenience of fly-cruise packages, the actual port of embarkation is less important than it once was. Most cruise passengers fly to the departing port now, so that shifting that departure port to a nearby Caribbean Island or to a Canadian or Mexican port may not be a particular marketing or logistical disadvantage, particularly compared to the financial flexibility that will be achieved by avoiding the regulatory reach of the Commission. The bottom line of course is that because the North American cruise market is a single market, these cruise operators will be seeking to attract the same cruise passengers, the only difference being that now those passengers will have no protection at all, thus utterly frustrating the statutory purpose behind P.L. 89-777. Naturally, any reduction of cruise ships calling at U.S. ports also will result in an economic loss to the ports and related industries, including reduced revenues and loss of jobs.

IV. THE BIGGEST WINNERS UNDER THE COMMISSION'S PROPOSAL WILL BE THE LARGEST FOREIGN-FLAG CRUISE LINES WHEREAS THE BIGGEST LOSERS WILL BE AMERICAN PASSENGER VESSEL COMPANIES

An unintended consequence of the proposed rule is the enhancement of the competitive position of the large foreign cruise lines at the expense of American operators.

A. Large foreign cruise lines are the primary beneficiaries of the Commission's proposal

The Commission's proposed rule would have little impact on the largest cruise lines that already dominate the market. The burden will fall disproportionately on smaller companies with more limited access to capital. As such, the Commission's

proposed rule will provide an enormous competitive advantage to the largest "super-lines" that already dominate the world market and which are, without exception, foreign-based.

Micky Arison, the chairman of Carnival Cruise Lines, the largest cruise company in the world, acknowledged the competitive advantage of the proposed regulation for his company:

> I have the cash on hand or the borrowing capabilities but I think I'm in a unique position in being able to say that. I think there are some companies that would find this devastating, and I don't think that's too strong a word.[33]

Ironically, for certain cruise companies, the increased bonding requirements could trigger exactly the kind of financial difficulties against which the original statute was designed to protect. The eventual outcome may be larger market concentration for the dominant cruise lines, hardly a happy result for the travelling public.

B. American-based cruise companies are hit the hardest by the Commission's proposal

The most devastating impact of the proposed rule would fall upon American-based lines. In fact, it is only for American companies that both aspects of the proposed rule would operate entirely to their detriment.

First, as mentioned above, the additional cash requirements favor the "super-lines," which are entirely foreign-based. U.S.-flag companies like AMCV already operate at a significant

---

[33] See Potential Nightmare For Cruise Lines, supra note 1, at 2.

competitive disadvantage against foreign-flag vessels because of higher capital costs, higher crew rates, and unfavorable tax treatment.[34] The increased bonding requirements will only increase that competitiveness gap.

Second, the Commission proposes to eliminate one of the few existing advantages to maintaining a U.S.-based cruise line -- the right to self-insure. Under current regulations, self-insurance is pegged to ownership of U.S.-based assets, and as such, only American-based companies have qualified. As noted earlier, American-based AMCV is currently the only commercial company in the world that self-insures. It would appear that this option fully protects passengers since AMCV's current U.S.-based net worth is 184% of its UPR.

Remarkably, the Commission has apparently concluded that U.S.-based assets are of no value for self-insurance purposes. Put another way, for the purpose of self-insurance, the Commission apparently considers assets based in the United States to be no more useful than assets based halfway around the globe.[35] The extreme nature of this proposal is evident when

---

[34] Even the advantages of coastwise trade eligibility have been eroded through broad Customs interpretations of the Jones Act, 46 U.S.C. § 883. For example, a foreign flag vessel is prohibited from taking on cargo in Miami and transporting it to Los Angeles, however, Customs allows the same transportation if the vessel carries cruise passengers instead. See 19 C.F.R. §4.80a.

[35] The legislative history of P.L. 89-777 appears to place some particular significance on the existence of U.S. based assets. See S. Rep. No. 1483, 89th Cong., 1st Sess. (1966), reprinted in 1966 U.S.C.C.A.N. 4176, 4182 ("many persons

(continued...)

considering The Walt Disney Co., which has announced plans to enter the cruise market. Under the proposed self-insurance rules, Disney's $5.7 billion in net worth would not constitute sufficient evidence of financial stability to allow it to self-insure.[36]

The loss of the right to self-insure will have no effect *on* foreign-based cruise lines, including those that dominate the industry. However, the impact on American lines like AMCV would be potentially disastrous, further eroding their ability to compete against their off-shore counterparts.

While the Commission is a "flag-blind" regulatory agency, it is indeed extraordinary that it would propose a regulation that singles out American companies for such a disproportionate burden. The effect on the U.S. maritime industry as a whole -- including shipboard and shipyard labor -- is difficult to calculate but could be significant. It is particularly ironic that the Commission has proposed a rule significantly disadvantaging U.S. cruise lines at the same time that Congress is considering legislation to enhance the competitive position of the American passenger vessel industry in the world market.[37]

---

[35](. ..continued)
operating in the cruise business are responsible and maintain sufficient assets in this country which could be proceeded against.")(emphasis added).

[36] See supra note 11, p. 13.

[37] On June 23, 1994, the Merchant Marine Subcommittee of the House Merchant Marine and Fisheries Committee reported favorably companion bills (the "Unsoeld Cruise Ship Bills,"
(continued...)

V. IF THE COMMISSION IS TO MAKE ANY CHANGES TO THE EXISTING RULES SUCH CHANGES SHOULD BE DIRECTED AT SPECIFIC PROBLEMS AND SHOULD ONLY BE UNDERTAKEN AFTER A THOROUGH INVESTIGATION

Given the well developed record supporting the Commission's current regulations and the convincing evidence that those regulations have been successful in protecting passengers against the risk of loss of their deposits and fares, AMCV does not believe that the proposed changes to the regulations are warranted. In particular, the self-insurance option is an important alternative for U.S. companies and should be retained. To the extent there are concerns with regard to the current self-insurance regulations, they can be addressed individually rather than simply discarding the option altogether as has been proposed. For example, the percentage threshold of networth as a function of UPR could be increased above 110% to provide an additional cushion of coverage.

Should the Commission decide, however, that elimination of the coverage ceiling is appropriate, AMCV suggests the following proposals to better address the disparity in coverage between large and small operators and to provide for full disclosure to the travelling public of whatever risks may be present with respect to their potential inability to recover deposits or fares in the event of nonperformance of the transportation.

---

[37](...continued)
H.R.3821 and H.R. 3822) designed to increase U.S.-flag participation in the cruise industry and to attract passenger cruise vessels to U.S. ports.

A. **Proposal 1: Protection of the public can be achieved through disclosure requirements** and a requirement to **offer additional insurance coverage for individual passengers**

The Commission's **current regulations provide substantial levels of coverage for the travelling public. To the extent any shortfall in coverage exists, it can be addressed in the time-honored manner of mandating full disclosure requirements. Therefore, as an alternative to the current rulemaking, AMCV proposes that the Commission require operators who do not have at least 100% coverage under one of the existing coverage options to identify in a prominent manner to their passengers the level of coverage on file with the Commission and to disclose any shortfall in coverage. This could include public disclosure of company balance sheets and other financial information. In addition, the Commission could require operators to make known to their passengers the current availability of additional insurance, similar to that available to rental car customers, should the cruise passenger so choose.**[38]

B. **Proposal 2: Initiate a new rulemaking to consider a berth-based formula, an indexed increase in the ceiling, or other alternatives to address the coverage "gap"**

One of the reasons advanced by the Commission for the removal of the current ceiling is the overall industry coverage "gap," especially that existing for larger vessel operators. 59 Fed. Reg. 15149, 15150 (Mar. 31, 1994). The overall gap, as well

---

[38] See **Exhibit B and the discussion of commercially available travel insurance,** supra **Section II.B.1.c, p. 34.**

as the disparity between these larger operators and smaller companies, could be addressed in ways other than the current approach. One possibility would be a formula based on the vessel operator's total number of berths.

Under such a proposal, coverage would be determined on a set dollar amount per berth and a prescribed minimum coverage. In order to preserve operator flexibility, the Commission should retain the alternative for any operator to provide coverage at the current rate of 110% of UPR, at the operator's option. As an example, a coverage requirement of $2,500 per berth, with minimum coverage of $5 million, would permit an operator such as Carnival Cruises, with a total berth capacity of 23,251,[39] to meet the financial responsibility requirements by posting a bond or other security in the amount of $58,127,500. On the other hand, a smaller operator with less than 2000 berths would have to provide the minimum $5 million coverage, or opt to meet the requirements with 110% of the operator's UPR. In this manner a dramatic reduction in the current "gap" could be achieved by more appropriately distributing the coverage among those responsible for the "gap."

Another alternative used by the Commission the last time the ceiling was raised is simply to tie an increase in coverage to the consumer price index ("CPI"). This was characterized by the Commission at the time as "fair" and "not unduly burdensome on

---

[39] The total capacity is based on Carnival, and its related companies, Holland America, Windstar Cruises and Seabourn Cruises, as reported in Seatrade Review, Mar. 1994, at 119.

the industry. When the ceiling was increased to $15 million in 1990, the CPI was 128.7. As of May 1994, the same index had increased to 147.5. Applying a pro rata increase as the Commission did in 1990 would raise the cap by $2,190,000 to a total of $17,190,000. See 55 Fed. Reg. 34564, 34566 (Aug. 23, 1990). It is a reasonable alternative for addressing the current issue.

There are certainly other proposals for providing enhanced security without imposing the burdens on the industry that the current proposal would. These should be considered, however, only if they are given the same level of scrutiny as the current rules. Before the Commission decides to reverse its long-settled policies and implement such wide-ranging changes as the proposed elimination of the UPR ceiling and the self-insurance option, a fact finding investigation, similar to the Ivancie Report, should be undertaken. Such an investigation is necessary to assess the actual evidence warranting a change, and more importantly to understand the impact on the cruise industry, on U.S. ports and on local economies. Only in this way can the Commission prepare the reasoned analysis required for changes of the kind suggested in this rulemaking.